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## IV. Mens Rea: Unintentional Homicide

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# DEVELOPMENTS IN CALIFORNIA HOMICIDE LAW

## I. INTRODUCTION\*

Of all crimes, homicide is perhaps the most serious. The result is, by definition, the death of a human being or fetus, and the consequences to the guilty individual may be equally as severe. Therefore, it is of the utmost importance that a practitioner, who either prosecutes or defends a homicide charge, understands the current state of California's homicide law. The interests at stake are that of the public's protection from criminal actors, and a defendant's protection from the infliction of a harsh penalty.<sup>1</sup>

California homicide law, however, is far from clear. Legislative inaction and ineffective ameliorative attempts by the courts to clarify archaic statutes prompted Justice Mosk to declare that "the law of homicide is in need of revision."<sup>2</sup> The purpose of this work is not to critique or propose solutions, but to serve as a reference guide to important developments in California homicide law. This work attempts to clarify the current state of the law in those respective areas affected by recent developments and, through citations, to serve as a gateway to recent case law, pertinent statutes, and secondary material.

Part II outlines the general structure of California homicide law. It lays out the basic foundation of criminal liability and defines the categories of murder and manslaughter. Part II then concludes with an overview of California death penalty law, known as special

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1. 1 OSCAR LEROY WARREN & BASIL MICHAEL BILAS, WARREN ON HOMICIDE, at iii (1938).

2. In re Christian S., 7 Cal. 4th 768, 784-85, 872 P.2d 574, 584, 30 Cal. Rptr. 2d 33, 43 (1994) (Mosk, J., concurring); see Charles L. Hobson, *Reforming California's Homicide Law*, 23 PEPP. L. REV. 495, 495 (1996).

circumstances, and provides an in-depth analysis of prior-murder and felony-murder special circumstances.

Part III discusses the mens rea requirement for the intentional homicides. In California, the three types of murder that involve an intent to kill are: premeditated murder, second-degree murder with express malice, and murder as a result of provocation. Part III analyzes the elements of the offenses, as well as the trends in the current courts. For instance, courts now tend to stray from the once rigid "Anderson factors" in determining whether sufficient evidence exists for premeditation. Second-degree murder with express malice requires a purpose to kill. Provocation enables murder to be mitigated to voluntary manslaughter.

Part IV examines the mens rea for the unintentional homicides. An actor may be liable for his unintended killings pursuant to several theories: second-degree murder under an implied malice theory, provocative act murder, or involuntary manslaughter. Implied malice murder exists where death results because of the defendant's reckless conduct. Provocative act murder also requires that a defendant act recklessly. Here, however, a defendant is liable for a killing that occurs when his provocative conduct triggers a third party to respond in a fatal way. As long as the defendant's conduct proximately caused the killing, he is liable although someone else actually fired the fatal shot. Part IV concludes with a discussion of involuntary manslaughter, which occurs when a defendant's criminal negligence causes a death.

Part V explores the issue of causation in homicide as divided into the elements of causation-in-fact and proximate causation. Typically, homicide cases focus primarily on the doctrine of proximate cause. Part V divides proximate cause into the following categories: (1) concurrent causation; (2) preexisting condition of the victim; (3) the intervening act doctrine; and (4) the felony-murder doctrine. This approach provides useful tools for practitioners confronted with various issues of causation. In addition, Part V explores the doctrine of transferred intent. While similar in some aspects to causation, this Part effectively treats the transferred intent doctrine as a separate discussion.

Part VI examines the felony-murder doctrine, which is triggered when a killing is committed during the perpetration of a non-assault

felony. Codified under Section 189 of the California Penal Code, the first-degree felony-murder doctrine applies strictly to killings committed during the commission of an enumerated felony. On the other hand, courts have attempted to limit the scope of the second-degree felony-murder doctrine by imposing restrictions such as an inherent danger requirement. This disparity in the scope of application of the felony-murder doctrine between first and second-degree murder demonstrates that, while some courts and scholars may disfavor the felony-murder doctrine, it remains firmly rooted in California law. Part VI then turns to a discussion of the agency doctrine as applied to felony-murder in California homicide law. Several problems arise regarding how far liability should extend when a co-felon or third party actually commits the killing.

Part VII turns to accomplice liability, which is a difficult area of California criminal law. This Part seeks to explore what courts mean by “aiding and abetting” and “natural and probable consequences.” Part VII concludes with a brief examination of the relationship required between the accomplice and the primary perpetrator before liability can be imposed.

Part VIII analyzes the conspiracy doctrine in California as it applies to homicide law. The discussion provides an overview of the elements of the crime, followed by an exposition of the various characteristics that make conspiracy unique as well as controversial. For instance, conspiracy is punishable as a separate crime from the underlying offense. This means conspirators may face charges both for the conspiracy itself and for the completed offense. As an inchoate crime, conspiracy subjects the defendant to criminal sanctions at a stage earlier than any other offense. Moreover, it imposes vicarious liability for the substantive offenses of co-conspirators. Finally, there are procedural advantages that make charging conspiracy an attractive alternative to charging a defendant for the substantive offense. Part VIII illustrates how, because of its unique characteristics, conspiracy is a powerful weapon for the prosecutor and can lead to unjust results if abused.

Part IX explores the subject of self-defense to murder. First, the concept of justifiable homicide is introduced and discussed, followed by a detailed discussion of the imminent harm requirement. Part IX then examines the current controversy regarding how much of a



defendant's experiences and point of view should be considered in determining how an objectively reasonable person in the place of the defendant would have acted. In addition, the limitations that the courts have placed on the use of individualized evidence to prove objective belief are explored. The development of the self-defense doctrine in cases of battered women's syndrome is analyzed throughout Part IX and compared to the more common applications of self-defense.

Finally, Part X discusses the insanity defense as it operates in California homicide law. Since the early nineteenth century, California has, with slight variation, followed the "M'Naughton test" for legal insanity. Part X examines the substantive aspects of that test, including the requirement that a defendant claiming insanity must have been either unable to appreciate the nature of his conduct at the time he committed a criminal act or unable to appreciate the wrongfulness of the act. Part X then touches upon some of the procedural implications of the defense, including competency to stand trial and the role of expert testimony.

## II. CALIFORNIA HOMICIDE LAW: THE BASICS\*

This Article outlines the general structure of California homicide law. After laying out the basic foundation of criminal liability, the Article turns to the relevant sections of the California Penal Code that delineate the elements of murder and manslaughter. The discussion concludes with an overview of California death penalty law, known as special circumstances, and provides an in-depth analysis of prior-murder and felony-murder special circumstances.

### *A. Definition of Murder*

California Penal Code section 187 defines murder as “the unlawful killing of a human being, or a fetus, with malice aforethought.”<sup>1</sup> Section 187(b) explicitly excludes from criminal liability death of a fetus due to 1) an abortion performed under the Therapeutic Abortion Act,<sup>2</sup> 2) procedures that are medically necessary to save the mother’s life,<sup>3</sup> or 3) acts that the mother of the fetus approved, aided or solicited.<sup>4</sup>

### *B. Overt Act*

The basic requirement for criminal liability is an actus reus, an affirmative act or an omission to act when there is a duty to act.<sup>5</sup>

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1. CAL. PENAL CODE § 187(a) (West 1999 & Supp. 2003).

2. CAL. HEALTH & SAFETY CODE §§ 123400-123450 (West 2002). The Therapeutic Abortion Act legalized and regulated abortions in California. But in 2002, due to constitutional infirmities, the California legislature repealed the Therapeutic Abortion Act, and instead adopted the Reproductive Privacy Act. *See id.* § 123460-123468. However, California Penal Code section 187 still refers to the Therapeutic Abortion Act. CAL. PENAL CODE § 187(b)(1).

3. CAL. PENAL CODE § 187(b)(2).

4. *Id.* § 187(b)(3).

5. *See People v. McCoy*, 25 Cal. 4th 1111, 1117, 24 P.3d 1210, 1214, 108 Cal. Rptr. 2d 188, 193 (2001) (actus reus can be an act or an omission).

Penal Code section 20 provides that "[i]n every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."<sup>6</sup> An intention to commit a crime or belief that one is committing a crime is not an adequate basis for criminal liability;<sup>7</sup> there must be an overt act that is the result of *conscious* and *volitional* movement that violates the law.

An act committed when the actor is unconscious does not constitute *actus reus* and does not bear criminal liability. In *People v. Newton*, the defendant, a member of the Black Panther Party, was pulled over by two police officers.<sup>8</sup> A gun battle ensued and the defendant was shot in the stomach. The defendant alleged both that he was unconscious when he shot the police officer and that he only pulled the trigger in a reflexive action.<sup>9</sup> The California Court of Appeal held that unconsciousness is a "'complete defense' because it negates capacity to commit any crime at all."<sup>10</sup>

The law imposes criminal liability not only for overt acts, but also for an omission to act when there is a legal duty to act.<sup>11</sup> The duty to act can be statutory, contractual, or based on the parties' special relationship, such as 1) voluntary assumption of care for another,<sup>12</sup> 2) parent-child,<sup>13</sup> 3) employer-employee, or 4) landowner-licensee.<sup>14</sup>

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6. CAL. PENAL CODE § 20 (West 1999 & Supp. 2003).

7. See 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW ELEMENTS CAL. CRIM. LAW ELEMENTS § 21 (3d ed. 2000) [hereinafter 1 WITKIN CAL. CRIM. LAW ELEMENTS].

8. 8 Cal. App. 3d 359, 87 Cal. Rptr. 394 (1970).

9. *Id.* at 373, 87 Cal. Rptr. at 402-03.

10. *Id.* at 377, 87 Cal. Rptr. at 406.

11. See 1 WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 22; see also *People v. Woodward*, 45 Cal. 293 (1873) (holding that a person who stood by, while others attempted to rape a little girl was not guilty of attempted rape when he did not aid, encourage or abet the assailants); *Davidson v. City of Westminster*, 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982) (holding that police officers did not have a duty to warn or to protect the plaintiff from a suspected assailant who was under police surveillance); *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1016-18, 195 Cal. Rptr. 484, 490-91 (1983) (explaining that when a patient is diagnosed as comatose without any likely recovery of brain function, "cessation of 'heroic' life support measures is not an affirmative act but rather a withdrawal or omission of further treatment . . . . A physician has no duty to continue treatment . . . once it has become futile in the opinion of qualified medical personnel.").

12. In *People v. Heitzman*, the California Supreme Court relied on Restatement (Second) of Torts, section 319 and explained that "[o]ne who

Most often, criminal liability for an omission to act arises from a statutory duty. For example, in *People v. Jones* the California Court of Appeal held that a father who failed to pay statutorily mandated child support was criminally liable, even though he did not live in California.<sup>15</sup> Similarly, in *People v. Heitzman*, a daughter was charged with violating California Penal Code section 368(a) for abuse of her elderly father.<sup>16</sup> The defendant's father lived with her brothers and died because of malnutrition, dehydration and extensive neglect. The California Supreme Court held that although the defendant knew that her brothers were neglecting their father and violating elder abuse statutes, she did not have a legal duty to control her brothers' actions.<sup>17</sup>

### C. *Mens Rea*

In addition to the overt act requirement, Penal Code section 20 provides that each criminal act must also be accompanied by a

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takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled" is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm. 9 Cal. 4th 189, 213, 886 P.2d 1229, 1244, 37 Cal. Rptr. 2d 236, 251 (1994). See *People v. Oliver*, 210 Cal. App. 3d 138, 149, 258 Cal. Rptr. 138, 144 (1989) (woman convicted of involuntary manslaughter for taking an inebriated man home, giving him a spoon to inject heroin, and not calling an ambulance when he collapsed and later died of a drug overdose. The Court of Appeal explained that because the defendant knew the victim was drunk and "took him from a public place where others might have taken care to prevent him from injuring himself, to a private place—her home—where she alone could provide such care . . . [she voluntarily assumed a duty to summon aid and her failure to do so was] a breach of that duty.").

13. In California, definitions and scope of parental duties are derived from California dependency and tort laws. See *Williams v. Garcetti*, 5 Cal. 4th 561, 570, 853 P.2d 507, 511, 20 Cal. Rptr. 2d 341, 345 (1993); see also *Singer v. Marx*, 144 Cal. App. 2d 637, 301 P.2d 440 (1956) (mother held liable for damage caused by her child's negligent rock throwing); *People v. Burden*, 72 Cal. App. 3d 603, 616, 140 Cal. Rptr. 282, 289 (1977) (A father was convicted of second degree murder for the death of his five-month-old son, who died because of malnutrition and dehydration. "The omission of a duty is in law the equivalent of an act and when death results, the standard for determination of the degree of homicide is identical.").

14. *Heitzman*, 9 Cal. 4th at 212, 886 P.2d at 1244, 37 Cal. Rptr. 2d at 251.

15. 257 Cal. App. 2d 235, 237, 64 Cal. Rptr. 622, 623 (1967).

16. See *Heitzman*, 9 Cal. 4th at 196, 886 P.2d at 1232, 37 Cal. Rptr. 2d at 239.

17. *Id.* at 215, 886 P.2d at 1245, 37 Cal. Rptr. 2d at 252.

necessary criminal intent, commonly referred to as mental state or mens rea.<sup>18</sup> As early as 1892, in *People v. Wright*, the California Supreme Court explained that each crime or public offense, under Penal Code section 20, consists of two elements: actus reus and mens rea.<sup>19</sup>

However murder also requires the additional element of malice aforethought.<sup>20</sup> Today, California Penal Code section 188 defines the requisite malice for murder,<sup>21</sup> which is the distinguishing element between the different categories of murder and manslaughter.<sup>22</sup> Section 188 differentiates between express and implied malice. Express malice is the "deliberate intention [to] unlawfully . . . take away the life of a fellow creature."<sup>23</sup> Implied malice exists when there is "no considerable provocation . . . or when the circumstances attending the killing show an abandoned and malignant heart."<sup>24</sup>

Although express and implied malice are used to distinguish between the different categories of murder, the felony-murder doctrine<sup>25</sup> does not require malice at all. Instead, due to the public policy concern of deterring felons from accidentally or negligently killing during the commission of a felony, the law holds felons "strictly responsible for killings they commit."<sup>26</sup> Thus, if the felon has the requisite mens rea for committing or aiding and abetting the underlying felony, malice for the killing is imputed to the felon.<sup>27</sup>

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18. See CAL. PENAL CODE § 20 (West 1999 & Supp. 2003); see also, *People v. McCoy*, 25 Cal. 4th 1111, 1117, 24 P.3d 1210, 1214, 108 Cal. Rptr. 2d, 188, 193 (2001) (equating mens rea with criminal intent).

19. 93 Cal. 564, 566, 29 P. 240, 241 (1892).

20. See *id.*

21. CAL. PENAL CODE § 188 (West 1999).

22. For an in depth analysis of malice aforethought, see discussion *infra* Parts III.A & III.B.

23. CAL. PENAL CODE § 188.

24. *Id.*

25. Felony murder occurs when a perpetrator kills while committing or attempting to commit one or more of the enumerated crimes in section 189 of the California Penal Code. See CAL. PENAL CODE § 139 (West 1999); see also *Felony-Murder*, *infra* Part VI.

26. *People v. Burton*, 6 Cal. 3d 375, 388, 491 P.2d 793, 801, 99 Cal. Rptr. 1, 9 (1971) (directly quoting their earlier decision *People v. Washington*, 62 Cal.2d 777, 781, 402 P.2d 130, 44 Cal. Rptr. 442 (1965)).

27. See DOUGLAS DALTON, WEST'S CALIFORNIA CRIMINAL LAW § 5.05[D][4] (1995).

### D. Unlawful

California Penal Code section 187(a) explicitly states that murder is the “unlawful” killing of another human being or fetus.<sup>28</sup> In murder proceedings, however, the court may find that the homicide is “excusable” or “justifiable.”<sup>29</sup> Penal Code section 195 provides that a killing is excusable when it was caused by an “accident and misfortune” while partaking in lawful activity by lawful means, with “usual and ordinary caution, and without any unlawful intent.”<sup>30</sup> Moreover, section 197 essentially limits “justifiable” homicide to instances of self-defense or defense of others.<sup>31</sup>

California Penal Code sections 195 and 197 limit instances of “excusable” and “justifiable” homicide to those enumerated in the statute and do not address the consequences of other possibly excusable killings. For instance, doctors who take patients off life support or cease to provide intravenous hydration or nourishment are not currently prosecuted for murder. In *Barber v. Superior Court*, two doctors were charged with murder when they respected the wishes of a comatose patient’s family and removed all respiratory and hydration equipment.<sup>32</sup> The court explained that California Penal Code sections 195 and 197 were inapplicable and the doctors’ actions would not be deemed “unlawful” because the removal of respiratory and hydration equipment did not constitute an affirmative act.<sup>33</sup> The court explained that because a doctor does not have a duty to continue medical treatment when the treatment has become futile, the death does not constitute an unlawful killing.<sup>34</sup>

### E. Killing

A person can be prosecuted for homicide only when there is a killing of a human being. The prosecution must establish the *corpus*

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28. CAL. PENAL CODE §187(a) (West 1999 & Supp. 2003).

29. *Id.* §§ 195, 197.

30. *Id.* § 195.

31. *See Barber v. Superior Court* 147 Cal. App. 3d 1006, 1012, 195 Cal. Rptr. 484, 487 (1983) (citing California Penal Code § 197).

32. *See id.* at 1010–11, 195 Cal. Rptr. at 486.

33. *See id.* at 1016, 195 Cal. Rptr. at 490; *see also* cases cited *supra* note 11 (holding that defendants were not criminally liable because they did not have a legal duty to act).

34. *Barber*, 147 Cal. App. 3d at 1017–18, 195 Cal. Rptr. at 491.

*delicti*,<sup>35</sup> which is a *prima facie* showing that there was a death caused by criminal agency.<sup>36</sup> The *corpus delicti* must be proven independently of the defendant's extrajudicial statements.<sup>37</sup> Although the *corpus delicti* rule resulted from the judiciary's fear that a defendant could be coerced to confess to a homicide that never occurred,<sup>38</sup> the victim's body does not need to be recovered to support a murder conviction.<sup>39</sup>

The victim's death is often easily established. However, the use of life support equipment, which extends circulatory and respiratory capabilities, can make the timing of death hard to establish.<sup>40</sup> Current law<sup>41</sup> provides two alternative definitions of death and thus alleviates this uncertainty: first, a person who has "irreversible cessation of circulatory and respiratory functions" is legally dead;<sup>42</sup> second, a person is considered legally dead when there is "irreversible cessation of all functions of the entire brain, including the brain stem."<sup>43</sup>

Prior to the adoption of a statutory definition of death under section 7180 of the Health and Safety Code, California courts relied on the Black's Law Dictionary definition of "death,"<sup>44</sup> which provided that death was "the cessation of life; the ceasing to exist; defined by physicians as a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent

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35. Latin for "body of the crime." BLACK'S LAW DICTIONARY 346 (7th ed. 1999).

36. See *People v. Jennings*, 53 Cal. 3d 334, 364, 807 P.2d 1009, 1027, 279 Cal. Rptr. 780, 798 (1991) (quoting *People v. Hamilton*, 48 Cal. 3d 1142, 1175, 774 P.2d 730, 749, 259 Cal. Rptr. 701, 720 (1989)).

37. See *People v. Hamilton*, 48 Cal. 3d 1142, 1175, 774 P. 2d 730, 749, 259 Cal. Rptr. 701, 720 (1989).

38. *Id.* at 1176, 774 P.2d at 750, 259 Cal. Rptr. at 721.

39. See *People v. Cullen*, 37 Cal. 2d 614, 624, 234 P.2d 1, 6 (1951); DALTON, *supra* note 29, § 5.04[F].

40. See e.g., *People v. Mitchell*, 132 Cal. App. 3d 389, 396, 183 Cal. Rptr. 166, 170 (1982).

41. CAL. HEALTH & SAFETY CODE § 7180 (West 2002 & Supp. 2003).

42. *Id.* § 7180(a)(1).

43. *Id.* § 7180(a)(2).

44. See e.g., *Thomas v. Anderson*, 96 Cal. App. 2d 371, 376, 215 P.2d 478, 481-42 (1950) (using Black's third edition definition of death); *Estate of Schmidt*, 261 Cal. App. 2d 262, 273, 67 Cal. Rptr. 847, 854 (1968) (borrowing Black's third edition definition of death).

thereon, such as respiration, pulsation, etc.”<sup>45</sup> For instance, in *People v. Mitchell*, the California Court of Appeal explained that under the common law definition of death, a brain dead victim is still legally alive.<sup>46</sup>

The common law definition of death posed unique problems for surgeons performing organ transplants. Because the common law provides that a brain dead victim is still alive if surgeons perform an organ transplant and the victim subsequently dies, the surgeon's actions can be deemed a superceding, intervening cause of death. Thus, the perpetrator who harmed the victim might avoid a murder charge.<sup>47</sup> However, because the common law definition of death is no longer used, such causation problems are rare.

### F. Causation

Assuming that the prosecution has proven mens rea and the *corpus delicti* of the crime, it must then prove that the defendant's acts caused the victim's death. The prosecution must prove that the defendant's unlawful act was the cause-in-fact as well as the proximate cause of the homicide.<sup>48</sup> Cause-in-fact is usually defined as “but for” causation. That is, “but for” the defendant's acts, the victim would not have been killed.<sup>49</sup>

Because cause-in-fact is a broad doctrine, proximate cause, also known as legal cause,<sup>50</sup> serves as a limitation on causation.<sup>51</sup> Proximate cause is the nexus between the defendant's act and the death of the victim.<sup>52</sup> It can be divided into five different categories:

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45. *Thomas v. Anderson*, 96 Cal. App. 2d 371, 376, 215 P.2d 478, 481–82 (1950) (citing Black's Law Dictionary third edition).

46. 132 Cal. App. 3d 389, 396, 183 Cal. Rptr. 166, 170 (1982).

47. *Id.* The court explained that “[w]here the accused intended to murder the victim but, using the common law definition of death, causation was interrupted by the transplant surgeon, the accused may be convicted of only attempted murder, battery or assault, all of which have much less severe punishments when compared to the punishment for criminal homicide.” *Id.* at 397, 183 Cal. Rptr. at 170.

48. See 1 WITKIN CAL. CRIM. LAW ELEMENT, *supra* note 7, §35.

49. See *id.*

50. See *id.*

51. Proximate cause is “a limitation which the courts have placed upon the actor's responsibility for the consequences of . . . [his] conduct.” BLACK'S LAW DICTIONARY 213 (7th ed. 1999).

52. See 1 WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 4, § 35.



concurrent causation; preexisting condition of the victim; the intervening act doctrine; alcohol related homicides; and felony-murder homicides.<sup>53</sup>

### G. Human Being or Fetus

According to California Penal Code section 187(a), a defendant can only be convicted of murder by killing another human being or a fetus.<sup>54</sup> Fetus is defined as "an unborn [human] offspring in the postembryonic period, after major structures have been outlined. This period occurs in humans seven or eight weeks after fertilization."<sup>55</sup>

Not only does a death of a fetus allow the prosecutor to charge the defendant with first-degree murder of the fetus, but if a pregnant woman is killed, the prosecutor can pursue a charge for multiple-murder special circumstance.<sup>56</sup> In *People v. Bunyard*, the California Supreme Court held that Penal Code section 190.2(a)(3)<sup>57</sup> can be read together with Penal Code section 187(a).<sup>58</sup> That interpretation made a single act that kills a pregnant woman and her unborn fetus prosecutable as a multiple-murder<sup>59</sup> and makes the defendant eligible for the death penalty or life in prison without the possibility of parole.<sup>60</sup> In *Bunyard*, the defendant hired a childhood friend to kill his pregnant wife.<sup>61</sup> The defendant tried to persuade the court to read sections 190.2 and 187(a) separately, arguing that a single act of pulling the trigger and "the word 'offense' in section 190.2, subdivision (a)(3) should be interpreted to emphasize the number of

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53. For a detailed analysis of causation, see *infra* Part V.

54. CAL. PENAL CODE § 187(a) (West 1999 & Supp. 2003).

55. California Jury Instructions in Criminal Law, no. 8.10 (6th ed. 1996) [hereinafter CALJIC 8.10].

56. CAL. PENAL CODE § 190.2(a)(3) (West 2002 & Supp. 2003).

57. The California Penal Code § 190.2(a) provides that "[t]he penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole . . . (3) [if] [t]he defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree." *Id.* § 190.2(a).

58. 45 Cal. 3d 1189, 1237, 756 P.2d 795, 827-28, 249 Cal. Rptr. 71, 104 (1988).

59. *See id.*

60. CAL. PENAL CODE § 190.2(a)

61. *See Bunyard*, 45 Cal. 3d. at 1200-01, 756 P. 2d at 801-02, 249 Cal. Rptr. at 77-78.

acts, not merely the number of deaths.”<sup>62</sup> The court rejected the defendant’s argument and concluded that judicial interpretation was unnecessary because both statutes were clear and unambiguous.<sup>63</sup>

### *H. Categories of Murder*

The California Penal Code divides criminal homicide into two categories: murder and manslaughter.<sup>64</sup> Section 189 further defines two types of murder, first and second-degree murder.<sup>65</sup> Similarly, section 192 defines three types of manslaughter: (1) voluntary manslaughter; (2) involuntary manslaughter; and (3) vehicular manslaughter.<sup>66</sup> The primary distinction between murder and manslaughter is the mens rea requirement of malice aforethought. Whereas section 187 provides that a homicide committed with malice aforethought constitutes murder,<sup>67</sup> section 192 provides that an unlawful killing without malice constitutes manslaughter.<sup>68</sup> This section will first define murder and then discuss manslaughter.

#### *1. First-degree murder*

California Penal Code section 189 distinguishes between first and second-degree murder.<sup>69</sup> First-degree murder can be satisfied in three ways.<sup>70</sup> One can be charged with first-degree murder if the killing is (1) “willful, deliberate, and premeditated;” (2) committed by a “destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, [and] torture;” or (3) if the killing constitutes felony-murder—i.e., murder committed in the course of committing one or more of the enumerated crimes in section 189.<sup>71</sup>

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62. *Id.* at 1238–39, 756 P.2d at 828, 249 Cal. Rptr. at 104.

63. *See id.*; *see also* CAL. PENAL CODE § 189 (West 1999 & Supp. 2003).

64. CAL. PENAL CODE §§ 189, 192.

65. *Id.* § 189.

66. *Id.* § 192.

67. *Id.* § 187(a).

68. *Id.* § 192.

69. *Id.* § 189.

70. *Id.*

71. *Id.* The enumerated felonies are: arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, torture, sodomy, lewd or lascivious act with a child under fourteen years old, oral copulation, rape by an instrument, or killing by means of discharging a firearm from a motor vehicle.

The only criminal intent required to trigger the felony-murder doctrine is the specific intent to commit one of those enumerated underlying felonies.<sup>72</sup>

## 2. Second-degree murder

Second-degree murder is a catchall category that encompasses "[a]ll other kinds of murders" that do not qualify as first-degree murder or felony-murder.<sup>73</sup> Although second-degree murder is a hodgepodge of numerous types of murder, it can be divided into three basic categories: 1) purposeful killing without premeditation,<sup>74</sup> 2) implied malice murder, or 3) inherently dangerous felony-murder.<sup>75</sup> This Section will provide a brief summary of each category.

### *a. purposeful killing without premeditation*

First, a purposeful killing without premeditation is usually defined as "the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation."<sup>76</sup> This type of second-degree murder has three elements: 1) an intentional killing with express malice,<sup>77</sup> 2) without premeditation, and 3) without provocation.<sup>78</sup>

*See id.* For an in-depth discussion of first-degree murder, see *infra*, Part III.A. For a discussion of felony-murder, see *infra*, Part VI.

72. *See* *People v. Coefield*, 37 Cal. 2d 865, 869, 236 P.2d 570, 573 (1951).

73. CAL. PENAL CODE § 189.

74. California Jury Instructions in Criminal Law number 8.30 defines second-degree murder as "the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation." CALJIC, *supra* note 57, no. 8.30 (6th ed. 1996). For an in depth analysis of unpremeditated murder, see Parts III.B & III.C.

75. For an in-depth analysis of inherently dangerous felony-murder, see *infra* Part VI.C.

76. CALJIC, *supra* note 57, no. 8.30.

77. *See* CAL. PENAL CODE § 188 (defining the difference between express and implied malice).

78. For an in-depth analysis of purposeful killing without premeditation, see *infra* Part III.B.

*b. implied malice murder*

The second category of second-degree murder is implied malice murder, which is an unintentional killing caused by extremely reckless behavior. California law provides two types of implied malice murder: depraved heart murder and provocative act murder. In California, the courts do not use the term "depraved heart murder." The concept is instead discussed in terms of implied malice.<sup>79</sup> However, California courts do utilize the term "provocative act murder." These two categories of implied malice share the same mens rea requirement of extreme recklessness. The primary difference between them is that in provocative act murder, liability attaches because of a particular causal pattern involving a defendant's action and a third party's reaction that kills the victim.

The two basic elements of implied malice murder are: 1) an unlawful act resulting in dangerous consequences, and 2) the defendant knew about the danger of the acts, yet consciously and deliberately disregarded the danger to human life. These elements together show that the defendant acted with extreme recklessness.<sup>80</sup>

In *People v. Watson*, the California Supreme Court defined implied malice as a subjective determination that the defendant in fact realized that his actions had "a high probability . . . [of] . . . result[ing] in death . . . [and yet acted] with a base antisocial motive and with a wanton disregard for human life."<sup>81</sup> However, the prosecution does not need to prove that the defendant intended to kill.<sup>82</sup>

The second category of unintentional killing caused by extreme recklessness is provocative act murder.<sup>83</sup> Provocative act murder

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79. See, e.g., Charles L. Hobson, *Reforming California's Homicide Law*, 23 PEPP. L. REV. 495, 540-41 (1996) (asserting that "depraved heart" and "implied malice" are synonymous); see also CAL. PENAL CODE § 188 (defining express and implied malice). For an in-depth analysis of depraved heart murder and implied malice, see *infra* Part IV.A.

80. CALJIC, *supra* note 57, no. 8.31.

81. 30 Cal. 3d 290, 300, 637 P.2d 279, 285, 179 Cal. Rptr. 43, 49 (1981) (quoting *People v. Washington*, 62 Cal. 2d 777, 782, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965)).

82. CALJIC, *supra* note 57, no. 8.31. For an in depth analysis of depraved heart murder and the requisite elements, see *infra* Part IV.A.

83. See *In re Aurelio R.*, 167 Cal. App. 3d 52, 57, 212 Cal. Rptr. 868, 870 (1985).

does not require that the defendant or the defendant's cohorts commit an act that immediately leads to death or even intend to kill the victim. Instead, the defendant acts in a manner that provokes a deadly response from a third person.<sup>84</sup> The actus reus element of the crime is the provocation and the mens rea element of the offense is knowledge that the provocation has a high probability of "eliciting a life-threatening response from the third party."<sup>85</sup>

Provocative act murder is often used when criminals attempt to escape the crime scene, law enforcement officers pursue them, and the criminals act in a manner that provokes the officers to kill one of them.<sup>86</sup> Provocative act murder theory is also used to convict gang members who partake in a gunfight that kills one of their members,<sup>87</sup> or when a victim kills a co-conspirator or agent in self-defense.<sup>88</sup>

Provocative act murder often raises causation concerns because the defendant is charged with murder when the defendant did not pull the trigger. In *People v. Garcia*, the California Court of Appeal explained that liability for provocative act murder is based on "proof of malice and vicarious liability."<sup>89</sup> However, a mere showing that the defendant committed an "intentional provocative act whose natural consequences are dangerous to human life" is not enough.<sup>90</sup> The prosecution must also show that the killing was proximately caused by the defendant's intentional and dangerous acts.<sup>91</sup>

Although most provocative act murders occur in the course of a felony, such as attempting to resist arrest or robbery,<sup>92</sup> this doctrine differs from felony-murder. Under the felony-murder doctrine, the defendant and the defendant's co-conspirators begin their criminal enterprise with intent to commit a felony and they kill a third party in

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84. *Id.* at 57, 212 Cal. Rptr. at 870-71.

85. *Id.* at 57-58, 212 Cal. Rptr. at 871.

86. *See id.* at 58, 212 Cal. Rptr. at 871.

87. *See id.* at 56, 212 Cal. Rptr. at 869.

88. *See id.* at 58, 212 Cal. Rptr. at 871.

89. 69 Cal. App. 4th 1324, 1329, 82 Cal. Rptr. 2d 254, 257 n.2 (1999).

90. *People v. Gardner*, 37 Cal. App. 4th 473, 480, 43 Cal. Rptr. 2d 603, 608 (1995).

91. *Id.*; *see also* *People v. Cervantes*, 26 Cal. 4th 860, 874, 29 P.3d 225, 235, 111 Cal. Rptr. 2d 148, 159 (2001) (holding that the provocative act doctrine requires a finding of proximate cause). For an in-depth analysis of proximate causation and provocative act murder, *see infra* Part IV.B.

92. *See Garcia*, 69 Cal. App. 4th at 1327, 82 Cal. Rptr. 2d at 256; *Aurelio R.*, 167 Cal. App. 3d at 57-58, 212 Cal. Rptr. at 871.

order to further their crime.<sup>93</sup> However, provocative act murder does not require that the defendant or one of the defendant's cohorts actually fire the fatal shot. In fact, a third party, such as a police officer, may pull the trigger. Moreover, unlike felony-murder where the killing furthers a criminal enterprise, provocative act murder does not require that the killing further a criminal design.

*c. inherently dangerous second-degree felony-murder*<sup>94</sup>

The third category of second-degree murder, inherently dangerous felony-murder, only applies to felonies that are "inherently dangerous to human life."<sup>95</sup> In determining whether a felony is inherently dangerous, the courts look at "the felony in the abstract, not the particular 'facts' of the case."<sup>96</sup> The court must determine whether there is a high probability that death will result from the commission of that felony.<sup>97</sup> The felony-murder doctrine does not apply if the felony "merges" with the resulting homicide.<sup>98</sup>

### 3. Manslaughter

The second category of homicide is manslaughter. California Penal Code section 192 defines manslaughter as the "unlawful killing of a human being without malice"<sup>99</sup> and divides manslaughter into three categories: 1) voluntary, 2) involuntary, and 3) vehicular.<sup>100</sup>

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93. See *Aurelio R.*, 167 Cal. App. 3d at 57, n.2, 212 Cal. Rptr. at 870 n.2.

94. For a discussion of inherently dangerous felony-murder, see *infra* Part VI.C.

95. See *People v. Hansen*, 9 Cal. 4th 300, 308, 885 P.2d 1022, 1026, 36 Cal. Rptr. 2d 609, 613 (1994); *People v. Ford*, 60 Cal. 2d 772, 795, 388 P.2d 892, 907, 36 Cal. Rptr. 620, 635 (1964) (overruled on other grounds by *People v. Satchell*, 6 Cal. 3d 28, 36, 489 P.2d 1361, 1367, 98 Cal. Rptr. 33, 39 (1971)).

96. See *Hansen*, 9 Cal. 4th at 309, 885 P.2d at 1026, 36 Cal. Rptr. 2d at 613 (internal quotations omitted); *People v. Williams*, 63 Cal. 2d 452, 458 n.5, 406 P.2d 647, 650 n.5, 47 Cal. Rptr. 7, 10 n.5 (1965).

97. See *Hansen*, 9 Cal. 4th at 309, 885 P.2d at 1026, 36 Cal. Rptr. 2d at 613; *People v. Patterson*, 49 Cal. 3d 615, 626–27, 778 P.2d 549, 558, 262 Cal. Rptr. 195, 204 (1989).

98. See *Hansen*, 9 Cal. 4th at 311–12, 885 P.2d at 1028, 36 Cal. Rptr. 2d at 615; *People v. Ireland*, 70 Cal. 2d 522, 539–40, 450 P.2d 580, 590, 75 Cal. Rptr. 188, 198 (1969).

99. CAL. PENAL CODE § 192 (West 1999 & Supp. 2003).

100. See *id.* § 192(a)–(c).

There are two primary distinctions between murder and manslaughter. First, manslaughter is a killing without malice, whereas murder requires proof of malice aforethought.<sup>101</sup> Second, unlike murder, where one is liable for the death of a human being or fetus, manslaughter does not apply to the killing of a fetus when the killing lacks malice.<sup>102</sup>

*a. voluntary manslaughter*

The first category of manslaughter is voluntary manslaughter.<sup>103</sup> First-degree murder, second-degree murder, and voluntary manslaughter all require an intent to kill, but the primary distinction between them is that a defendant charged with voluntary manslaughter lacks malice because the defendant acts "upon a sudden quarrel or heat of passion."<sup>104</sup>

*b. involuntary manslaughter*

The second category of manslaughter is involuntary manslaughter. Section 192(b) defines involuntary manslaughter as a killing resulting from "the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."<sup>105</sup> The primary distinction between voluntary and involuntary manslaughter is that involuntary manslaughter does not require an intent to kill.<sup>106</sup>

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101. See *id.* §§ 189, 192; CALJIC, *supra* note 57, no. 8.50.

102. See *People v. Dennis*, 17 Cal. 4th 468, 510, 950 P.2d 1035, 1058, 71 Cal. Rptr. 2d 680, 703 (1998).

103. For a detailed analysis of voluntary manslaughter, see *infra* Part III.B.

104. CAL. PENAL CODE § 192(a); see *People v. Lee*, 20 Cal. 4th 47, 58, 971 P.2d 1001, 1007, 82 Cal. Rptr. 2d 625, 631 (1999); *People v. Lasko*, 23 Cal. 4th 101, 108, 999 P.2d 666, 670, 96 Cal. Rptr. 2d 441, 446 (2000).

105. CAL. PENAL CODE § 192(b).

106. See *People v. Welch*, 137 Cal. App.3d 834, 839-40, 187 Cal. Rptr. 511, 514 (1982); *People v. Broussard*, 76 Cal. App. 3d 193, 197, 142 Cal. Rptr. 664, 666 (1977); CALJIC, *supra* note 57, no. 8.45. For a detailed analysis of involuntary manslaughter, see *infra* Part IV.C.

*c. vehicular manslaughter*

Vehicular manslaughter is the third category of manslaughter and consists of five different types.<sup>107</sup> The primary distinctions among the various categories of vehicular manslaughter are whether the killing resulted from gross negligence, whether the driver was under the influence of alcohol or drugs, and whether death was the proximate result of a car accident for financial gain.<sup>108</sup> It is important to note that as long as the facts support a finding of implied malice under section 188 of the California Penal Code,<sup>109</sup> the prosecution has discretion to charge the defendant with second-degree murder instead of vehicular manslaughter.<sup>110</sup>

If the prosecutor decides to pursue a vehicular manslaughter charge, the prosecutor must decide whether the defendant acted with gross negligence. Gross negligence is often defined as “the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences.”<sup>111</sup> Although this definition of gross negligence seems very similar to the extreme recklessness requirement of second-degree implied malice murder, the California Supreme Court has held that they are not synonymous.<sup>112</sup>

The first difference between gross negligence and second-degree implied malice murder is that an objective standard is used to determine whether a defendant was grossly negligent, whereas a subjective standard is used to determine implied malice murder.<sup>113</sup> Second, “implied malice contemplates a subjective awareness of a higher degree of risk than does gross negligence, and involves an element of wantonness which is absent in gross negligence.”<sup>114</sup>

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107. See CAL. PENAL CODE §§ 191.5(a), 192(c)(1)–(3).

108. *Id.* §§ 191.5, 192.

109. *Id.* § 188.

110. See *id.* §§ 191.5, 192; *People v. Watson*, 30 Cal. 3d 290, 294, 637 P.2d 279, 282, 179 Cal. Rptr. 43, 46 (1981).

111. *Watson*, 30 Cal. 3d at 296, 637 P.2d at 283, 179 Cal. Rptr. at 47.

112. See *id.* at 296–97, 637 P.2d at 283, 179 Cal. Rptr. at 47.

113. See *id.*

114. *Id.* at 296, 637 P.2d at 283, 179 Cal. Rptr. at 47. In response to *People v. Watson*, the California legislature amended sections 191.5 and 192 of the California Penal Code, which now explicitly provide that the vehicular manslaughter statutes “shall not be construed as prohibiting or precluding a charge of murder under Section 188 upon facts exhibiting wantonness and a conscious disregard for life to support a finding of implied malice, or upon



In determining whether the defendant was grossly negligent, the offense must be dangerous as committed. In *People v. Wells*, the defendant was driving between fifty and eighty miles per hour on a curvy road, struck another car, and killed the passenger.<sup>115</sup> The California Supreme Court agreed with the trial court that although driving over the speed limit is an "unlawful act," as defined by section 192(c)(1), the unlawful act "need not be an inherently dangerous misdemeanor or infraction."<sup>116</sup> Moreover, the court explained that gross negligence is found where the defendant commits an offense that is "dangerous under the circumstances of its commission. The inherent or abstract nature of a misdemeanor which underlies an involuntary manslaughter charge is not dispositive."<sup>117</sup>

Moreover, the mere fact that the defendant is driving while under the influence of alcohol is not enough to constitute gross negligence.<sup>118</sup> In *People v. Bennett*, the California Supreme Court held that a finding of gross negligence should be based on "the overall circumstances of [the defendant's] intoxication."<sup>119</sup>

In *Bennett*, the defendant, who drank heavily with two friends and became extremely intoxicated, drove his two friends to another destination.<sup>120</sup> The defendant was driving ten miles per hour in excess of the speed limit, weaving in and out of his traffic lane, and drifting off the road.<sup>121</sup> As the defendant approached a blind curve, he lost control of his car. The defendant and his friends were all ejected from the car, killing one friend. The defendant's blood alcohol level two hours after the accident was 0.20 percent.<sup>122</sup>

At trial, the court instructed the jury to determine gross negligence from "the overall circumstances of the defendant's

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facts showing malice consistent with the holding of the California Supreme Court in *People v. Watson*, 30 Cal.3d 290." CAL. PENAL CODE § 192(4).

115. 12 Cal. 4th 979, 982, 911 P.2d 1374, 1375, 50 Cal. Rptr. 2d 699, 700 (1996).

116. *Id.*

117. *Id.* at 988, 911 P.2d at 1379, 50 Cal. Rptr. 2d at 704.

118. See CALJIC, *supra* note 57, no. 8.94.

119. 54 Cal. 3d 1032, 1034, 819 P.2d 849, 854, 2 Cal. Rptr. 2d 8, 13 (1991) (quoting CALJIC no. 8.94.)

120. *Id.* at 1034-35, 819 P.2d at 851, 2 Cal. Rptr. 2d at 9.

121. See *id.*

122. See *id.* at 1035, 819 P.2d at 851, 2 Cal. Rptr. 2d at 10.

intoxication or the manner in which he drove, or both . . . .”<sup>123</sup> The trial court convicted the defendant of gross vehicular manslaughter while intoxicated.<sup>124</sup> The California Supreme Court affirmed the conviction, because “a driver’s level of intoxication is an integral aspect of the ‘driving conduct.’”<sup>125</sup>

### *I. Special Circumstances*

California Penal Code section 190, also known as the 1978 death penalty law, provides that every person convicted of first-degree murder can be punished by death, life imprisonment without the possibility of parole, or imprisonment in the state prison for twenty-five years to life. Specifically, Penal Code section 190.2 dictates twenty-two different categories,<sup>126</sup> known as “special circumstances” that jurors may use to decide whether to punish the defendant with either the death penalty or life in prison without the possibility of parole. They are:

- 1) Intentional murder for financial gain;<sup>127</sup>
- 2) Prior conviction for first-degree or second-degree murder;<sup>128</sup>
- 3) A defendant, in this proceeding, has been convicted of multiple murders in the first or second-degree;<sup>129</sup>
- 4) Murder committed by destructive device, bomb or other explosives;<sup>130</sup>
- 5) Murder to avoid arrest or to perfect an escape;<sup>131</sup>
- 6) Murder committed by “destructive device, bomb, or explosive that the defendant mailed or delivered;”<sup>132</sup>
- 7) Intentional murder of a current or former peace officer, federal officer or agent, or firefighter;<sup>133</sup>
- 8) Intentional murder of a witness to a crime;<sup>134</sup>

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123. *Id.*; see also CALJIC, *supra* note 57, no. 8.94.

124. *Bennett*, 54 Cal. 3d at 1035, 819 P.2d at 851, 2 Cal. Rptr. 2d at 9.

125. *Id.* at 1038, 819 P.2d at 853, 2 Cal. Rptr. 2d at 12.

126. For efficiency, this Part combines some categories.

127. CAL. PENAL CODE § 190.2(a)(1) (West 1999 & Supp. 2003).

128. *See id.* § 190.2(a)(2).

129. *See id.* § 190.2(a)(3).

130. *See id.* § 190.2(a)(4).

131. *See id.* § 190.2(a)(5).

132. *See id.* § 190.2(a)(6).

133. *See id.* § 190.2(a)(7)–(9).

- 9) Intentional murder of a current or former state or local prosecutor or assistant prosecutor, judge, federal official or juror;<sup>135</sup>
- 10) Murder that is "especially heinous, atrocious, or cruel;"<sup>136</sup>
- 11) Intentional murder by lying in wait;<sup>137</sup>
- 12) Intentional murder because of the victim's "race, color, religion, nationality, or country of origin;"<sup>138</sup>
- 13) Murder while the defendant was engaged in robbery, kidnapping, rape, sodomy, performance of lewd or lascivious act on a child under the age of fourteen, oral copulation, burglary, arson, train wrecking, mayhem, or carjacking;<sup>139</sup>
- 14) Intentional murder involving torture;<sup>140</sup>
- 15) Intentional murder by poison;<sup>141</sup>
- 16) Intentional murder by discharging a firearm from a motor vehicle;<sup>142</sup>
- 17) Murder to further gang activity.<sup>143</sup>

This Section will provide a brief overview of special circumstances as an aggravating factor, the requirement of intent, the constitutionality of special circumstances, and the application of the special circumstances doctrine to juveniles. The discussion will then focus on an in-depth analysis of sections 190.2(a)(2) and 190.2(a)(17).

### 1. Special circumstances as aggravating factors

Although sections 190, 190.1, and 190.2 refer to "special circumstances" as a means of punishment and sentencing, the

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134. *See id.* § 190.2(a)(10).

135. *See id.* § 190.2(a)(11)–(13), (20).

136. *See id.* § 190.2(a)(14).

137. *See id.* § 190.2(a)(15).

138. *See id.* § 190.2(a)(16).

139. *See id.* § 190.2(a)(17). Section 190.2 (a)(17) is also commonly known as "felony-murder special circumstances" [hereinafter felony-murder special circumstances]. *See* DALTON, *supra* note 29, § 5.05 [D][9].

140. *See* CAL. PENAL CODE § 190.2(a)(18).

141. *See id.* § 190.2(a)(19).

142. *See id.* § 190.2(a)(21).

143. *See id.* § 190.2(a)(22).

California Supreme Court has explained that “special circumstances are sui generis—neither a crime, an enhancement, nor a sentencing factor.”<sup>144</sup> Instead, special circumstance proceedings can be compared to a trial to determine guilt and should be viewed as “an aggravating factor . . . found beyond reasonable doubt by a unanimous verdict,”<sup>145</sup> which then changes the punishment to either death or life imprisonment without possibility of parole.<sup>146</sup>

## 2. Special circumstances and the intent requirement

Fourteen of the twenty-two special circumstances listed in section 190.2 explicitly require an intentional killing. The only categories that do not require an intentional killing are prior-murder convictions,<sup>147</sup> multiple murders,<sup>148</sup> murder by destructive device,<sup>149</sup> murder to avoid arrest or to perfect an escape,<sup>150</sup> murder by destructive device via mail,<sup>151</sup> and especially heinous, atrocious or cruel murder.<sup>152</sup>

## 3. Constitutionality of special circumstances

Section 190.4 provides many procedural requirements for applying “special circumstances.” These strict requirements are necessary because in *Furman v. Georgia* and *Gregg v. Georgia*, the United States Supreme Court held that death penalty laws giving juries absolute discretion are too arbitrary because they can be applied capriciously, and thus constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.<sup>153</sup> Therefore, in 1997 the California legislature

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144. *People v. Garcia*, 36 Cal. 3d 539, 552, 684 P.2d 826, 832, 205 Cal. Rptr. 265, 271 (1984).

145. *People v. Superior Court of Santa Clara County*, 31 Cal. 3d 797, 803, 647 P.2d 76, 79, 183 Cal. Rptr. 800, 803 (1982) (internal citations omitted) (real party in interest, Engert).

146. *See id.*

147. *See* CAL. PENAL CODE § 190.2(a)(2).

148. *See id.* § 190.2(a)(3).

149. *See id.* § 190.2(a)(4).

150. *See id.* § 190.2(a)(5).

151. *See id.* § 190.2(a)(6).

152. *See id.* § 190.2(a)(14).

153. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972); *Gregg v. Georgia*, 428 U.S. 153, 155 (1976).

instituted the procedural provisions of section 190.2 and 190.4 in order to comply with the *Furman-Gregg* standard.<sup>154</sup>

In short, section 190.4 provides that during the guilt phase of the trial, one or more of the special circumstances enumerated in section 190.2 must be proven beyond a reasonable doubt. Only if the jury unanimously finds that one or more of the special circumstances are true may the court then hold a separate penalty hearing. At that hearing, the trier of fact will decide whether to sentence the defendant to death or life imprisonment without the possibility of parole.<sup>155</sup>

#### 4. Death penalty and juveniles

Although section 190(a) provides that every person found guilty of first-degree murder may be sentenced according to the "special circumstances" classifications of section 190.2,<sup>156</sup> juveniles are explicitly exempt from the death penalty. Section 190.5 provides that people between the ages of sixteen and eighteen, at the time of the offense, and who are convicted of first-degree murder with one or more special circumstances, will be sentenced to life in prison without the possibility of parole or twenty-five years to life.<sup>157</sup>

California voters enacted section 190.5 as part of Proposition 115 in June 1990, making juveniles eligible for charges of special circumstance murder and sentences of life in prison without the possibility of parole or twenty-five years to life.<sup>158</sup> Under section 190.5, juveniles may be sentenced to state prison, and judges cannot

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154. See, e.g., *People v. Green*, 27 Cal. 3d 1, 49, 609 P.2d 468, 497, 164 Cal. Rptr. 1, 30 (1980), *overruled on other grounds by* *People v. Martinez*, 20 Cal. 4th 225, 973 P.2d 512, 83 Cal. Rptr. 2d 533 (1999).

155. See CAL PENAL CODE § 190.4(a).

156. See *id.* §190(a).

157. See *id.* § 190.5.

158. See *People v. Bustos*, 23 Cal. App. 4th 1747, 1756, 29 Cal. Rptr.2d 112, 118 (1994). Prior to Proposition 115, in *People v. Spears*, the California Supreme Court held that juveniles are ineligible for special circumstance proceedings. *People v. Spears*, 33 Cal.3d 279 at 283, 655 P.2d 1289 at 1292, 188 Cal. Rptr. 454 at 457 (1983). In *Spears*, a seventeen-year-old boy was convicted of two counts of murder with special circumstances and sentenced to two consecutive terms of life in prison without the possibility of parole. See *id.* at 280, 655 P.2d at 1290, 188 Cal. Rptr. at 455. The Supreme Court held that the 1978 death penalty law was not intended to penalize juveniles with life imprisonment without the possibility of parole. See *id.* at 283, 655 P.2d at 1291, 188 Cal. Rptr. at 456.

automatically refuse to commit them to the California Youth Authority (CYA).<sup>159</sup> In *People v. Bustos*, the California Court of Appeal held that prior to sentencing, trial courts should adhere to section 707.2 of the Welfare and Institutions Code, which requires that trial courts obtain a diagnostic study from the CYA to determine if the juvenile could benefit from any CYA training or treatment programs.<sup>160</sup> Moreover, the court in *Bustos* held that even if a juvenile is sentenced to twenty-five years to life, he still qualifies for commitment to the CYA.<sup>161</sup>

### 5. Prior murders

A defendant can be charged with special circumstances under section 190.2(a)(2) if he has previously been convicted of first-degree or second-degree murder in California or another jurisdiction. Section 190.2(a)(2) applies even if the prior murder conviction was subsequent to the current offense. For example, in *People v. Hendricks*, the defendant was working as a male prostitute and robbed and killed two of his clients—Carter and Burchell.<sup>162</sup> One year later, he was arrested and charged with the murder of two other men, Parmer and Haynes.<sup>163</sup> During the course of his interrogation for the murders of Parmer and Haynes, the defendant also confessed to killing Carter and Burchell the year before.<sup>164</sup> During his first trial, the defendant was tried and convicted of murder and robbery for the Parmer and Haynes killings.<sup>165</sup> In his second trial, the defendant was convicted of both multiple-murder special

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159. *Bustos*, 23 Cal. App. 4th at 1758, 29 Cal. Rptr.2d at 119.

160. CAL WELF. & INST. CODE § 707.2 (West 1998 & Supp. 2003).

161. See *Bustos*, 23 Cal. App. 4th at 1757, 29 Cal. Rptr. 2d at 118; see also *People v. Ralph*, 24 Cal. 2d 575, 583, 150 P.2d 401, 405 (1944) (holding similarly that juveniles are entitled to be committed to the CYA), *overruled in part by People v. Yates*, 34 Cal. 3d 644, 669 P.2d 1, 194 Cal. Rptr. 765 (1983); *In re Jeanice D.*, 28 Cal. 3d 210, 212–13, 617 P.2d 1087, 1088, 168 Cal. Rptr. 455, 456 (1980) (holding that a juvenile's conviction for first-degree murder without special circumstances does not automatically make her ineligible for CYA commitment); *People v. King*, 5 Cal. 4th 59, 62–63, 851 P.2d 27, 28, 19 Cal. Rptr. 2d 233, 234 (1993) (holding that a person who committed first-degree murder when he was under eighteen is eligible for CYA).

162. 43 Cal. 3d 584, 588, 737 P.2d 1350, 1352, 238 Cal. Rptr. 66, 68 (1987).

163. See *id.* at 590, 737 P.2d at 1353, 238 Cal. Rptr. at 69.

164. See *id.*

165. See *id.* at 588–89, 737 P.2d at 1352, 238 Cal. Rptr. at 68.

circumstance and felony-murder special circumstance for the Carter and Burchell killings. He was then sentenced to death.<sup>166</sup>

The defendant argued that the prior-murder special circumstance verdict from the Carter and Burchell trial should be set aside because the Parmer and Haynes murders were committed after the Carter and Burchell murders. He reasoned that because he was first prosecuted for the Parmer and Haynes murders, he did not qualify for the previous murder special circumstance of section 190.2(a)(2).<sup>167</sup> The court found this argument unconvincing and stated that the plain language of section 190.2(a)(2) shows that the order of the homicides is irrelevant.<sup>168</sup>

Moreover, prior-murder special circumstance is not limited to prior murder convictions in California. Killings in other jurisdictions that would be punishable as first-degree or second-degree murder in California can be considered as prior murders, and the defendant can be subject to special circumstance proceedings. In *People v. Andrews*, the defendant was convicted of three counts of first-degree murder with special circumstances of prior-murder, multiple murder, robbery-murder, and murder during commission of a rape.<sup>169</sup> In 1967, when the defendant was sixteen years old, he had been convicted of murder in Alabama. The jury in the current trial used the defendant's Alabama murder conviction to find the special circumstance of prior-murder under 190.2(a)(2).<sup>170</sup>

The defendant argued that under California law in 1967, most juveniles between sixteen and eighteen years old were usually tried in juvenile court, but Alabama tried juveniles in adult criminal court. The defendant claimed that his Alabama conviction should not be used to find a prior-murder special circumstance under section 190.2(a)(2) because it denied him equal protection of the law.<sup>171</sup> The court rejected the defendant's argument and held that in 1967, if a

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166. See *id.* at 588–89, 737 P.2d at 1352–53, 238 Cal. Rptr. at 68.

167. The defendant reasoned “the death penalty is appropriate only when a defendant commits murder after he has been put on notice by a *previous* murder conviction that if he repeats the crime he might suffer the ultimate punishment.” *Id.* at 595, 737 P.2d at 1357, 238 Cal. Rptr. at 72–73 (emphasis added).

168. See *id.* at 596, 737 P.2d at 1357, 238 Cal. Rptr. at 73.

169. 49 Cal. 3d 200, 206, 776 P.2d 285, 287, 260 Cal. Rptr. 583, 586 (1989).

170. See *id.* at 221–22, 776 P.2d at 298, 260 Cal. Rptr. at 596.

171. *Id.*

juvenile committed murder in California, he could be tried as an adult if the court found that it would be appropriate to do so.<sup>172</sup>

The debate about minors' prior convictions in other jurisdictions was conclusively decided in *People v. Trevino*.<sup>173</sup> The California Supreme Court held that, regardless of a defendant's age, a first-degree or second-degree murder conviction in another jurisdiction may be used for prior-murder special circumstance "if the offense involved *conduct* that satisfies all the elements of the offense of murder under California law."<sup>174</sup>

#### 6. Felony-murder special circumstance

The felony-murder special circumstance is used when the defendant kills during the course of a felony enumerated in section 190.2(a)(17).<sup>175</sup> The underlying felonies constituting felony-murder special circumstance under section 190.2(a)(17) and first-degree felony-murder under section 189 are identical.<sup>176</sup> Special circumstances may be found if the perpetrator kills while committing or attempting to commit one of the following twelve crimes:

- 1) Arson
- 2) Burglary
- 3) Carjacking
- 4) Kidnapping
- 5) Lewd or lascivious act with a child under fourteen years old
- 6) Mayhem
- 7) Oral copulation
- 8) Rape
- 9) Rape by an instrument

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172. *Id.*

173. 26 Cal. 4th 237, 27 P.3d 283, 109 Cal. Rptr. 2d 567 (2001).

174. *Id.* at 244, 27 P.3d at 287, 109 Cal. Rptr. 2d at 571 (emphasis in original).

175. See CAL. PENAL CODE § 190.2(a)(17) (West 1999 & Supp. 2003).

176. See *id.* §§ 189, 190.2(a)(17) (it should be noted that §190.2(a)(17) solely enumerated felonies constituting felony-murder, whereas the corresponding list under § 189 follows the more obscure description—"committed in the perpetration of, or attempt to perpetrate," and is buried between two other lists of felonies not qualifying as felony-murder—thereby not making it readily apparent that the lists are identical).



- 10) Robbery
- 11) Sodomy
- 12) Train wrecking<sup>177</sup>

Despite their similarities, there are two fundamental differences between sections 189 and 190.2(a)(17). First, under felony-murder special circumstances, the prosecution may seek the death penalty, whereas the prosecution may not do so under section 189.<sup>178</sup> Second, unlike section 189 felony-murder, which never requires intent to kill, the felony-murder special circumstance requires that an aider and abettor either intend to kill or have "reckless indifference to human life,"<sup>179</sup> but it does not require that the actual killer intend to kill.<sup>180</sup>

In *Tison v. Arizona*, the United State Supreme Court addressed the question of whether intent to kill is constitutionally required.<sup>181</sup> After surveying death penalty laws across the country, the Supreme Court held that felony-murder special circumstance laws need not require specific intent to kill. The court reasoned that when looking at the totality of circumstances, "major participation in the felony committed, combined with reckless indifference to human life . . ." <sup>182</sup> constituted a culpable mental state that can be considered during capital sentencing.

Although felony-murder special circumstance does not require that the murderer intended to kill, the prosecution must prove that the accused had the requisite mens rea for the underlying felony.<sup>183</sup> In

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177. See *id.* §§ 189, 190.2(a)(17). For an in depth discussion of first-degree murder, see *infra* Part III.A. For a detailed discussion of felony-murder, see *infra* Part VI.

178. See *id.* § 190.2(a).

179. *Id.* § 190.2(d).

180. See *id.* § 190.2(b); see also *People v. Anderson*, 43 Cal. 3d 1104, 1138–39, 742 P.2d 1306, 1325–36, 240 Cal. Rptr. 585, 604–605 (1987) (holding that felony-murder special circumstance does not require that the murderer intended to kill, but the prosecution must prove that an aider and abettor had the requisite intent to kill); 3 WITKIN CAL. CRIM. LAW PUNISHMENT § 453 (2000) (explaining that Proposition 115 codified the *Anderson* decision in 1990, and added section 190.2(b) to the California Penal Code).

181. 481 U.S. 137 (1987).

182. *Id.* at 158.

183. See *People v. Musselwhite*, 17 Cal. 4th 1216, 1263, 954 P.2d 475, 504, 74 Cal. Rptr. 2d 212, 241 (1998).

*People v. Davis*, the California Supreme Court explained that section 190.4<sup>184</sup> requires that when the underlying felony is a general intent crime,<sup>185</sup> only a general intent instruction should be given.<sup>186</sup> The court further explained that “[w]e have never held that ‘specific intent’ is required for the felony-murder special circumstance.”<sup>187</sup>

Once the prosecution proves the mens rea for the underlying felony, the prosecution does not need to independently prove that the killing happened during the commission of the underlying felony.<sup>188</sup> In *People v. Musselwhite*, the defendant killed a woman one week after attempting to kill another woman in the course of a robbery.<sup>189</sup> The defendant admitted to killing the victim but argued that his prolonged use of crack cocaine led to brain damage that rendered him unable to form the requisite intent to kill.<sup>190</sup> The California Supreme Court held that because section 190.41 explicitly provides that “the corpus delicti of a felony-based special circumstance . . . need not be proved independently of a defendant’s extrajudicial statement,”<sup>191</sup> and thus felony-murder special circumstance does not “require independent proof of the *additional* special circumstance . . . the jury [need only] apply the *corpus delicti* rule to the underlying felony.”<sup>192</sup>

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184. California Penal Code section 190.4(a) provides that:

Whenever special circumstances . . . are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance . . . Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

CAL. PENAL CODE § 190.4(a).

185. “General intent” crimes require that the defendant intends to do the act that causes harm, such as rape or kidnapping. “Specific intent” crimes require that defendants intend to cause harm. See *Davis*, 10 Cal. 4th at 518 n.15, 896 P.2d at 148–49 n.15, 41 Cal. Rptr. 2d at 856 n.15.

186. See 10 Cal. 4th 463, 519, 896 P.2d 119, 149, 41 Cal. Rptr. 2d, 826 856.

187. *Id.*

188. See *Musselwhite*, 17 Cal. 4th at 1264, 954 P.2d at 504, 74 Cal Rptr. 2d at 241.

189. *Id.* at 1228–29, 954 P.2d at 482, 74 Cal Rptr. 2d at 219.

190. See *id.*

191. CAL. PENAL CODE § 190.41.

192. *Musselwhite*, 17 Cal. 4th at 1264, 954 P.2d at 504–05, 74 Cal Rptr. 2d at 241–42 (emphasis in original).

Although the prosecution only needs to prove that the killer intended to commit the underlying felony, the prosecution must prove that the defendant killed the victim in order to advance the felony.<sup>193</sup> For example, in *People v. Green*, the defendant killed his sixteen-year-old wife because he thought that she was having an affair.<sup>194</sup> He then took her clothes, purse and jewelry to make it look like a robbery.<sup>195</sup> The defendant was convicted of first-degree murder with robbery and kidnapping special circumstances. The California Supreme Court affirmed the first-degree murder charge but overturned the special circumstance verdicts because the "sole object [of the robbery was] to facilitate or conceal the primary crime."<sup>196</sup> The court also explained that the legislature intended that section 190.2 be used to punish "those defendants who killed in cold blood in order to advance an independent felonious purpose, e.g., who carried out an execution-style slaying of the victim of or witness to a holdup, a kidnapping, or a rape."<sup>197</sup>

### *J. Conclusion*

Once the prosecution proves the *corpus delicti* of the crime, it may then pursue a charge of first-degree or second-degree murder, or manslaughter. Because the primary distinction between these categories of homicide is *mens rea*, the prosecution must determine whether it has sufficient evidence to prove the requisite mental state and to show that the defendant's actions caused the victim's death. If the defendant is convicted of first-degree murder, the prosecution may then determine whether the defendant qualifies for special circumstances proceedings under the enumerated categories of California Penal Code section 190.2. If one of the categories is satisfied, the prosecution may pursue either the death penalty or life in prison without the possibility of parole.

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193. See *People v. Green*, 27 Cal. 3d 1, 61, 609 P.2d 468, 505, 164 Cal. Rptr. 1, 38 (1980).

194. See *id.* at 13, 609 P.2d at 474, 164 Cal. Rptr. at 7.

195. See *id.* at 15-16, 609 P.2d at 475-76, 164 Cal. Rptr. at 8-9.

196. *Id.* at 61, 609 P.2d at 505, 164 Cal. Rptr. at 38.

197. *Id.*

### III. MENS REA: PURPOSE TO KILL OFFENSES\*

In California, there are three types of murder that involve a purpose to kill—a conscious object to end another’s life: (1) premeditated murder; (2) purpose to kill without premeditation; and (3) purpose to kill as a result of provocation. Premeditated murder involves a purpose to kill, accomplished with forethought.<sup>1</sup> A purpose to kill without premeditation, on the other hand, is a purposeful murder accomplished without reflection or sufficient provocation.<sup>2</sup> A purposeful killing committed upon provocation involves an individual who acts rashly and not by judgment in response to provocative conduct of the victim. Section A explains how courts define and assess premeditated murder. Section B clarifies purposeful murder without premeditation or adequate provocation—second-degree murder. Section C elucidates what constitutes adequate provocation, which enables a court to reduce first-degree murder to voluntary manslaughter.

#### A. Premeditation

##### 1. The elements: purpose to kill and preexisting reflection

Murder in California is defined as “killing . . . with malice aforethought.”<sup>3</sup> Malice aforethought involves a malicious will. “Malice may be express or implied.”<sup>4</sup> It is express when the defendant possesses a purpose to take another’s life.<sup>5</sup> It is implied “when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and

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1. See discussion *infra* Section A.

2. See discussion *infra* Section B.

3. CAL. PENAL CODE § 187 (1999).

4. *Id.* at § 188.

5. See *id.*

malignant heart.”<sup>6</sup> While premeditated murder requires a purpose to kill,<sup>7</sup> it also demands a “preexisting reflection and weighing of considerations.”<sup>8</sup> Thus, the mental state or mens rea required for premeditation involves a purpose to kill and preexisting reflection.<sup>9</sup> Premeditation does not, however, demand careful, intelligent, or meaningful reflection.<sup>10</sup> In effect, purpose to kill and preexisting reflection are separate elements, both of which comprise the mental state needed for premeditation.<sup>11</sup>

While premeditation is often defined as a preexisting purpose to kill, a purpose to kill alone is not sufficient to support a finding of premeditation.<sup>12</sup> In *People v. Thomas*, the defendant shot and killed his wife.<sup>13</sup> The question before the court was whether the defendant acted with premeditation when he carried out his purpose to kill the victim.<sup>14</sup> For a first-degree murder conviction, the purpose to kill must be formed upon a preexisting reflection.<sup>15</sup> A mere purpose to kill is insufficient.<sup>16</sup> Although the defendant admitted to waiting for his wife to return in order to kill her, waiting was insufficient proof of a preexisting reflection to kill.<sup>17</sup>

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6. *Id.*

7. See Suzanne Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference*, 36 U.S.F. L. REV. 261, 275 (2002).

8. *People v. Perez*, 2 Cal. 4th 1117, 1125, 831 P.2d 1159, 1163, 9 Cal. Rptr. 2d 577, 581 (1992).

9. See *People v. Bender*, 27 Cal. 2d 164, 182, 163 P.2d 8, 18 (1945); *People v. Thomas*, 25 Cal. 2d 880, 900, 156 P.2d 7, 18 (1945); *Perez*, 2 Cal. 4th at 1125, 831 P.2d at 1163, 9 Cal. Rptr. 2d at 581; see also CAL. PENAL CODE § 189 (1999) (“All murder which is perpetrated by means of . . . poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, . . . is murder of the first degree. All other kinds of murder are of the second-degree.”).

10. See *id.*

11. See *People v. Holt*, 25 Cal. 2d 59, 70, 153 P.2d 21, 27 (1944); see also Mounts, *supra* note 7 at 290.

12. See *Thomas*, 25 Cal. 2d at 901, 156 P.2d at 18.

13. *Id.* at 888, 156 P.2d at 11–12.

14. See *id.* at 885, 156 P.2d at 11.

15. See *id.* at 900, 156 P.2d at 19.

16. See *id.*

17. See *id.* at 891, 156 P.2d at 13.

No considerable amount of time between the purpose to kill and the killing itself needs to exist because “they may be as instantaneous as successive thoughts of the mind.”<sup>18</sup> Reflection and consideration, however, must precede the purpose to kill.<sup>19</sup> If that requirement is satisfied, then once the purpose to kill is formulated, the “act of killing may instantaneously follow the intention.”<sup>20</sup> Thus, the test for premeditation does not consider the duration, but rather the extent of reflection.<sup>21</sup>

In *People v. Memro*, the court found the defendant guilty of the premeditated killing of two boys even though the time period between the defendant’s purpose to kill and the actual killing was minimal.<sup>22</sup> The defendant murdered three young boys.<sup>23</sup> He killed the first after he became enraged at the boy’s remark towards homosexuals.<sup>24</sup> He murdered the second after the victim screamed in response to the first murder.<sup>25</sup> The court found ample evidence of premeditation for the second murder, reasoning that the time between the scream and the defendant running over to the second victim was “imbued with deliberation and premeditation”<sup>26</sup> because the defendant considered his options as he ran from his first victim to his next. The murder of the third victim was also premeditated because the defendant’s act of tying the victim’s hands behind his back and strangling him gave the defendant sufficient time, although short, for reflection.<sup>27</sup>

Even less time existed between the purpose to kill and the killing in *People v. Hughes*.<sup>28</sup> In that case, the defendant stabbed and murdered his neighbor.<sup>29</sup> More specifically, the defendant’s failure to inflict any fatal stab wounds provoked him to strangle his victim

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18. *Id.* at 900, 156 P.2d at 18 (quoting *People v. Sanchez*, 24 Cal. 17, 30 (1864) (citations omitted)).

19. *See id.*

20. *Id.*

21. *See id.*

22. 11 Cal. 4th 786, 905 P.2d 1305, 47 Cal. Rptr. 2d 219 (1995).

23. *See id.* at 811–14, 905 P.2d at 1314–16, 47 Cal. Rptr. 2d at 228–30.

24. *See id.* at 814, 905 P.2d at 1316, 47 Cal. Rptr. 2d at 229–30.

25. *See id.* at 814, 905 P.2d at 1316, 47 Cal. Rptr. 2d at 230.

26. *Id.* at 863, 905 P.2d at 1347, 47 Cal. Rptr. 2d at 261.

27. *See id.*

28. 27 Cal. 4th 287, 39 P.3d 432, 116 Cal. Rptr. 2d 401 (2002).

29. *See id.* at 316, 39 P.3d at 450, 116 Cal. Rptr. 2d at 422–23.

in order to eliminate her as a witness.<sup>30</sup> Because the victim had not died from the stab wounds, the defendant acted upon sufficient reflection in strangling her to death.<sup>31</sup> This was sufficient evidence to support an inference of a preexisting purpose to kill, despite the lack of an appreciable amount of time between the initial stabbing and the strangulation.<sup>32</sup>

## 2. *Anderson* factors: planning, motive, and manner

It is difficult to distinguish between a bare purpose to kill and a purpose to kill resulting from preexisting reflection.<sup>33</sup> Following *People v. Anderson*,<sup>34</sup> California courts look for three factors as evidence of premeditation.<sup>35</sup> The three *Anderson* factors are merely guidelines for gauging evidence of premeditation; *Anderson* does not set forth a strict rule.<sup>36</sup> These factors do not have independent legal significance, but they stand as potential indicators of the degree to which the defendant reflected upon a decision to kill prior to the actual killing.<sup>37</sup> Despite this caveat, the modern court still uses the *Anderson* factors as guidelines for assessing premeditation.

In *Anderson*, the defendant perpetrated a brutal murder upon a ten-year-old girl. Nevertheless, the court convicted the defendant of second-degree murder rather than first-degree murder because there was an absence of premeditation.<sup>38</sup> The first factor the court examined involves planning activity—the defendant's actions prior to the killing.<sup>39</sup> The second factor is motive.<sup>40</sup> Proof of motive is

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30. See *id.* at 371, 39 P.3d at 486, 116 Cal. Rptr. 2d at 466.

31. See *id.* at 371, 39 P.3d at 487, 116 Cal. Rptr. 2d at 466.

32. See *id.*

33. See Suzanne Mounts, *Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation*, 33 U.S.F. L. REV. 313, 332 (1999).

34. 70 Cal. 2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968).

35. California courts must also review the whole record, "drawing all reasonable inferences in favor of [the judgment to] . . . determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Hughes*, 27 Cal. 4th at 370, 39 P.3d at 486, 116 Cal. Rptr. 2d at 454 (citations omitted).

36. See *infra* note 76 and accompanying text.

37. See *infra* subsection 2.b.

38. See *Anderson*, 70 Cal. 2d at 35–36, 447 P.2d at 954–55, 73 Cal. Rptr. at 563.

39. See *id.* at 26–27, 447 P.2d at 942, 73 Cal. Rptr. at 557.

40. See *id.*

significant to the extent it reveals reflection. The defendant's prior relationship with the victim or the defendant's conduct towards the victim may reveal a premeditated desire to kill.<sup>41</sup> The third factor considers the manner of the killing.<sup>42</sup> If the manner of killing implies that the defendant must have purposefully killed according to a "preconceived design,"<sup>43</sup> courts will infer that the defendant acted with preexisting reflection. California courts typically find premeditation when there is evidence of all three factors.<sup>44</sup> Either strong evidence of planning or evidence of motive, in conjunction with planning or manner of killing, however, is often sufficient.<sup>45</sup>

In *Anderson*, although the defendant murdered the daughter of the woman with whom he was living,<sup>46</sup> the court found insufficient evidence of the above three factors: planning, motive, and manner.<sup>47</sup> The defendant's actions prior to the murder did not support a preexisting reflection.<sup>48</sup> Furthermore, the defendant lacked a tangible motive to kill the victim.<sup>49</sup> Finally, the manner of killing did not suggest that the victim's wounds were "deliberately calculated to result in death."<sup>50</sup> Therefore, despite the brutality of the murder, the court found that the defendant did not kill with premeditation. Accordingly, the defendant was convicted of second-degree murder rather than first-degree murder.

*a. applying the Anderson factors*

*People v. Bolin* is an example of a case in which all three *Anderson* factors were present.<sup>51</sup> The defendant shot three individuals, including his "business" partner, because his partner showed their marijuana plants to the other two individuals.<sup>52</sup> The

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41. *See id.*

42. *See id.*

43. *See People v. Koontz*, 27 Cal. 4th 1041, 1081, 46 P.3d 335, 361, 119 Cal. Rptr. 2d 859, 891 (2002).

44. *See id.*; *see also Anderson*, 70 Cal. 2d at 27, 447 P.2d at 949, 73 Cal. Rptr. at 557.

45. *See Anderson*, 70 Cal. 2d at 19, 447 P.2d at 944, 73 Cal. Rptr. at 557.

46. *See id.*

47. *See id.* at 33–34, 447 P.2d at 953, 73 Cal. Rptr. at 561.

48. *See id.* at 34–35, 447 P.2d at 953–54, 73 Cal. Rptr. at 561–62.

49. *See id.*

50. *Id.* at 33–34, 447 P.2d at 953, 73 Cal. Rptr. at 561.

51. 18 Cal. 4th 297, 956 P.2d 374, 75 Cal. Rptr. 2d 412 (1998).

52. *Id.* at 310, 956 P.2d 384, 75 Cal. Rptr. 2d at 422.



court held that the defendant's murders were premeditated. First, the defendant planned the murders; once he realized his partner had shown his crop to others, he walked to his cabin to retrieve his gun, and before leaving the crime scene, he tried to cover up his involvement.<sup>53</sup> Second, defendant's motive for the killings suggested reflection; he sought to protect his marijuana crop, punish his partner for betraying his trust, and eliminate witnesses to the crimes of marijuana possession and murder.<sup>54</sup> Finally, the manner of killing revealed preexisting reflection; the victims died of multiple gunshot wounds. While each gunshot would have been fatal, the defendant continued shooting at the victims, suggesting a purpose to kill imbued with premeditation.<sup>55</sup> Although the time between his purpose to kill and the actual killing occurred over a short period, the defendant's actions revealed a purposeful, reflective killing.<sup>56</sup>

Similarly, in *People v. Steele* all three *Anderson* factors were present.<sup>57</sup> In that case, the defendant murdered his victim by strangulation and multiple stab wounds.<sup>58</sup> A reasonable jury could infer that the defendant planned to murder the victim because the defendant carried a knife with him into the victim's house.<sup>59</sup> Once in the house, the defendant told the victim to "[p]ut the phone down or I'll kill you."<sup>60</sup> Although the time between this threat and the murder was minimal, this statement "suggest[ed] a planned killing."<sup>61</sup> Furthermore, the defendant's admission that he hated women and had murdered a woman in the past established sufficient evidence of motive, which suggested reflection.<sup>62</sup> Moreover, the defendant murdered another woman in almost the same distinct manner.<sup>63</sup> The

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53. *See id.*

54. *See id.* at 333, 956 P.2d 399, 75 Cal. Rptr. 2d at 437.

55. *See id.*

56. *See id.*

57. 47 P.3d at 225, 120 Cal. Rptr. 2d at 432, 447-48 (2002); *see also Perez*, 2 Cal. 4th at 1127, 831 P.2d at 1164, 9 Cal. Rptr. 2d at 582 (finding premeditation where the defendant beat and stabbed his victim to death despite "evidence [that] is admittedly not overwhelming.").

58. *See Steele*, 27 Cal. 4th at 1238-39, 47 P.3d at 230, 120 Cal. Rptr. 2d at 439.

59. *See id.* at 1250, 47 P.3d at 238, 12 Cal. Rptr. 2d at 448.

60. *Id.*

61. *Id.*

62. *See id.*

63. *See id.*

pattern of using multiple stab wounds and strangulation in order to kill women suggested a “calculated design to ensure death, rather than an unconsidered ‘explosion’ of violence.”<sup>64</sup>

Generally, if the *Anderson* factors are satisfied, a killing will appear especially brutal; however, “the brutality of a killing [alone does not] support a finding [of] premeditation . . . .”<sup>65</sup> Acts of severe violence are not sufficient to establish that an individual acted with “careful thought and weighing of considerations.”<sup>66</sup> Rather, the “People bear the burden of establishing [premeditation] beyond a reasonable doubt . . . .”<sup>67</sup> Therefore, the presumption rests in favor of a finding of second-degree murder rather than first-degree murder.<sup>68</sup>

For instance, the brutal beating of an eighty-two-year-old stepfather was insufficient evidence of premeditation.<sup>69</sup> In *People v. Tubby*, the defendant and his stepfather had an “amicable” relationship.<sup>70</sup> The defendant, however, was severely intoxicated during his vicious outburst.<sup>71</sup> Even though “the defendant dragged the [victim] inside the house to continue his assault . . . that in itself [does not point to] a pre-existing intent to kill.”<sup>72</sup> Thus, the *Tubby* court found that the defendant did not plan to kill his stepfather, either before or during the beating.<sup>73</sup>

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64. *Id.* (quoting *People v. Alcala*, 36 Cal. 3d 604, 627, 685 P.2d 1126, 1138, 205 Cal. Rptr. 775, 787 (1984)).

65. *Anderson*, 70 Cal. 2d at 24, 447 P.2d at 947, 73 Cal. Rptr. at 555.

66. *Bender*, 27 Cal. 2d 164, 184, 163 P.2d 8, 19 (1945) (discussing the meaning of deliberate); *see also* *People v. Caldwell*, 43 Cal. 2d 864, 869, 279 P.2d 539, 542 (1955); *People v. Tubby*, 34 Cal. 2d 72, 78–79, 207 P.2d 51, 55 (1949).

67. *Anderson*, 70 Cal. 2d at 24, 447 P.2d at 947, 73 Cal. Rptr. at 555.

68. *See Anderson*, 70 Cal. 2d at 25, 447 P.2d at 947–48, 73 Cal. Rptr. at 555–56.

69. *See Tubby*, 34 Cal. 2d at 74–75, 207 P.2d at 55.

70. *Id.* at 77, 207 P.2d at 54.

71. *See id.*

72. *Id.* at 78–79, 207 P.2d at 55.

73. *See id.* at 79, 207 P.2d at 55.

*b. Anderson factors as guidelines, not rules*

Although courts employ the *Anderson* factors as support for premeditation, these factors "do not establish normative rules."<sup>74</sup> Instead, they provide descriptive guidelines for a premeditation analysis.<sup>75</sup> The *Anderson* factors aid courts in determining whether sufficient evidence exists to support an inference that the killing was the result of "preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse."<sup>76</sup> The factors do not provide an exclusive list of evidence that supports premeditation, nor must they exist in a particular combination or hold a specified weight.<sup>77</sup>

In *People v. Thomas*, for example, only two of the three *Anderson* factors were present, but the court still allowed the defendant to be convicted of first-degree premeditated murder for killing two individuals.<sup>78</sup> The court found that planning activity was present because the defendant returned to his car to retrieve his rifle before shooting the victims.<sup>79</sup> Additionally, due to a malfunction in the defendant's rifle, he had to reload before each shot, suggesting planning.<sup>80</sup> Furthermore, the manner of the killings showed the defendant's premeditated, preconceived design because both victims were shot at point-blank range.<sup>81</sup> The court, however, chose not to decide whether a motive existed because the prosecution had never

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74. *People v. Sanchez*, 12 Cal. 4th 1, 32, 906 P.2d 1129, 1148, 47 Cal. Rptr. 2d 843, 863 (1995). "The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing considerations. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way." *People v. Thomas*, 2 Cal. 4th 489, 517, 828 P.2d 101, 114, 7 Cal. Rptr. 2d 199, 212 (1992) (citation omitted). It has been argued, however, that "the court now seems to regard the category of premeditated and deliberated murders as sort of a 'catchall' for murders that the court deems particularly reprehensible but that are not committed by one of the other means specified in section 189." Mounts, *supra* note 7, at 324.

75. See *Perez*, 2 Cal. 4th at 1125, 821 P.2d at 1163, 9 Cal. Rptr. 2d at 581.

76. *Id.*; see also *Steele*, 27 Cal. 4th at 1250, 47 P.3d at 237, 120 Cal. Rptr. 2d at 447 (jury could infer that because defendant carried a knife into the victim's house, defendant deliberated about the possibility of homicide).

77. See *Perez*, 2 Cal. 4th at 1125, 821 P.2d at 1163, 9 Cal. Rptr. 2d at 581.

78. 2 Cal. 4th 489, 828 P.2d 101, 7 Cal. Rptr. 2d 199 (1992).

79. See *id.* at 517, 828 P.2d at 115, 7 Cal. Rptr. 2d at 213.

80. See *id.*

81. See *id.* at 518, 828 P.2d at 115, 7 Cal. Rptr. 2d at 213.

before been required to prove a motive. The court held that, “[a] senseless, random, but premeditated killing supports a verdict of first degree murder.”<sup>82</sup>

Therefore, premeditated murder requires both a purposeful, conscious object to end another’s life, as well as a preexisting reflection and weighing of considerations. No specific amount of time needs to exist between the formation of a purpose to kill and the killing itself, but a preexisting reflection must pervade the murder. Furthermore, although not required to do so, courts use the *Anderson* factors—planning, motive, and manner—to aid in the premeditation analysis and to determine whether the evidence is sufficient to support an inference that the defendant killed with reflection. The original notion of *Anderson* was to provide a strict guideline for courts to assess evidence of premeditation. If the factors were present, then courts would hold that the killing was premeditated. The modern trend, however, is to apply the *Anderson* factors more leniently. The result is that premeditation has taken on less and less meaning, becoming more synonymous with a purpose to kill.

*B. Second-Degree Murder with Express Malice:  
Purpose to Kill without Premeditation*

Second-degree murder is the catch-all murder. If a murder is not committed in the first degree—if it is not accomplished with premeditation, or if it is not an enumerated felony-murder—then it is second-degree murder.<sup>83</sup> Unlike premeditation, which requires express malice, the mental state for second-degree murder can be either express or implied.<sup>84</sup> If the mental state is express, the

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82. *Id.* at 519, 828 P.2d at 116, 7 Cal. Rptr. 2d at 214.

83. “All murder which is perpetrated by means of . . . poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate arson, rape, carjacking, robbery, burglary, mayhem . . . is murder of the first degree. All other kinds of murder are of the second-degree.” CAL. PENAL CODE § 189 (1999).

84. *See People v. Butts*, 236 Cal. App. 2d 817, 827, 46 Cal. Rptr. 362, 368 (1965).

“Malice” may be either express or implied.

[Malice is express when there is a manifested intention unlawfully to kill a human being.]

[Malice is implied when:

defendant must possess a purpose to kill, but preexisting reflection is not required. In these cases, the span of reflection necessary to constitute premeditated murder is absent.<sup>85</sup> Second-degree murder with express malice also includes situations in which the defendant harbors a purpose to kill and kills his victim without sufficient provocation.

On the other hand, if malice is implied, then proof of a purpose to kill is not required.<sup>86</sup> Malice is implied "when the circumstances surrounding a killing reveal a malignant heart."<sup>87</sup> This section explains killings committed with express malice—a purpose to kill—but which lack sufficient evidence of premeditation or provocation.

### 1. The elements: purpose to kill

Second-degree murder with express malice requires the prosecution to prove both that the defendant committed an act that caused the killing, and that the defendant committed that act with a

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1. The killing results from an intentional act,
  2. The natural consequences of the act are dangerous to human life, and
  3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.]

[When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.]

....

The word "aforethought" does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

CALJIC No. 8.11 (1996); *see also* *People v. Love*, 111 Cal. App. 3d 98, 108, 168 Cal. Rptr. 407, 412–13 (1980) (holding that malice can either be express or implied for second degree murder, as second degree murder encompasses both life-threatening conduct accomplished with a purposeful intent, and subjective awareness of the risk involved as well as life-endangering conduct which is *only* done with the awareness that the conduct is contrary to the laws of society).

85. *See Butts*, 236 Cal. App. 2d at 828, 46 Cal. Rptr. at 368. "Murder of the second-degree is [also] the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation." CALJIC No. 8.30.

86. *See Butts*, 236 Cal. App. 2d at 827, 46 Cal. Rptr. at 368.

87. *Id.*

purpose to kill.<sup>88</sup> A purpose to kill does not demand a hatred for the victim.<sup>89</sup> Rather, a purpose to kill implies "a wish to . . . injure another person, or an intent to do a wrongful act, established either by proof or presumption of law."<sup>90</sup> In effect, the mens rea required for second-degree murder with express malice is a purpose to kill. As long as a defendant, who harbors a purpose to kill, neither murders with premeditation nor acts upon a sudden heat of passion or adequate provocation, then he has acted with express malice and is guilty of second-degree murder.<sup>91</sup>

The purpose to kill that is required for second-degree murder with express malice, however, is not synonymous with the mental state required for premeditated murder.<sup>92</sup> While premeditated murder includes both a purpose to kill as well as a preexisting reflection, second-degree murder with express malice only requires a purpose to kill. Thus, if the prosecution proves that the defendant purposefully killed, but does not prove premeditation,<sup>93</sup> the verdict should then be second-degree murder, not first-degree murder.<sup>94</sup>

For example, In *People v. Bender*, the Supreme Court reduced the defendant's conviction from murder in the first degree to murder in the second degree because the defendant purposefully killed his victim, but he did so without premeditation.<sup>95</sup> The defendant strangled his wife following a marriage characterized by violent, drunken arguments over the fact that the defendant was still married to his first wife.<sup>96</sup> The trial court's jury instructions, however,

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88. See *Love*, 111 Cal. App. 3d at 105, 168 Cal. Rptr. at 410 (1980). Malice aforethought exists "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." CAL. PENAL CODE § 188 (1999).

89. See *Love*, 111 Cal. App. 3d at 105, 168 Cal. Rptr. at 410.

90. CAL. PENAL CODE § 7(4) (1999).

91. See *Love*, 111 Cal. App. 3d at 105-06, 168 Cal. Rptr. at 411.

92. See *People v. Bender*, 27 Cal. 2d 164, 179, 163 P.2d 8, 17 (1945); see also Suzanne Mounts, *Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation*, 33 U.S.F. L. REV. 313, 328 (1999) ("An intentional killing in the absence of adequate provocation was committed with malice and unless accompanied by premeditation and deliberation, or other aggravating circumstances, was second-degree murder.").

93. See *Bender*, 27 Cal. 2d at 179, 163 P.2d at 17 (citing *People v. Howard*, 211 Cal. 322, 329, 295 P.2d 333, 336 (1930)).

94. See *id.*

95. 27 Cal. 2d 164, 167, 163 P.2d 8, 11 (1945).

96. See *id.* at 168, 163 P.2d at 11.

blurred the distinction between a purposeful murder and a murder committed with calculation and forethought.<sup>97</sup> While first-degree premeditated murder and second-degree murder with express malice both require a purpose to kill, an individual cannot properly be convicted of first-degree murder if the murder was purposeful, yet without reflection and calculation.<sup>98</sup> Thus, because the defendant in *Bender* had a purpose to kill, but not a preexisting reflection, his conviction was reduced to second-degree murder.<sup>99</sup>

Furthermore, in *People v. Butts*, the court found the defendant guilty of second-degree murder where there was insufficient evidence of premeditation.<sup>100</sup> There, defendant Otwell engaged in a knife fight that resulted in the victim's death.<sup>101</sup> The defendant argued that because the jury found that he did not commit the murder with premeditation, the court could not find that he acted with a purpose to kill the victim and thus could not convict him of second-degree murder.<sup>102</sup> Because the defendant used a knife in a fight against unarmed individuals while shouting, "You damn right I've got a knife, and I'm going to use it," the court found that a jury could infer that the defendant possessed a purpose to take the victim's life.<sup>103</sup> Ultimately, the defendant was found guilty of second-degree murder, despite a lack of premeditation, because the defendant possessed the requisite mental state of a purpose to kill.<sup>104</sup>

Courts also look at the previous relationship between the defendant and the victim when assessing whether the murder is committed in the first degree or second degree. In *People v. Mendes*, the defendant had an argument with a stranger in a bar.<sup>105</sup> The defendant left the scene of the argument, but later returned with a gun. A police officer then chased after the defendant, and the defendant, believing the officer was the stranger, shot and killed him.<sup>106</sup> Regardless of whether the defendant thought his pursuer was

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97. See *id.* at 183–84, 163 P.2d at 19–20.

98. See *id.* at 180–81, 163 P.2d at 18.

99. See *id.* at 186–87, 163 P.2d at 21.

100. 236 Cal. App. 2d 817, 46 Cal. Rptr. 362 (1965).

101. See *id.* at 825, 46 Cal. Rptr. at 367.

102. See *id.* at 829, 46 Cal. Rptr. at 369.

103. *Id.*

104. See *id.*

105. 35 Cal. 2d 537, 219 P.2d 1 (1950).

106. See *id.* at 540, 219 P.2d at 3.

the stranger or the police officer, there was insufficient evidence that the defendant premeditated the killing.<sup>107</sup> The defendant did not know either the stranger or the police officer prior to the shooting. Without a prior relationship or a motive suggesting a reflective rather than impulsive killing, the evidence supported a finding that the defendant was guilty of second-degree murder, not first-degree murder.<sup>108</sup>

Additionally, if the defendant does not meet his burden of producing sufficient evidence of provocation, the result will be a second-degree murder verdict.<sup>109</sup> The defendant, however, must still possess express malice—a purpose to kill. If the defendant does not kill in response to adequate provocation, a court will not reduce the crime to voluntary manslaughter, and the defendant will be convicted of murder in the second degree.

In *People v. Fields*, for example, the court found the defendant guilty of second-degree murder, despite possessing a purpose to kill his victim, because the murder was neither a result of preexisting reflection nor a response to adequate provocation.<sup>110</sup> The defendant ingested sedative pills that caused extreme mood changes, and then he shot and killed his friend.<sup>111</sup> Although his mood was volatile on the night of the shooting, the defendant harbored no anger towards his victim. This lack of anger indicated that the murder was not planned.<sup>112</sup> Furthermore, there was no evidence of provocation prior to the shooting.<sup>113</sup> Rather, the court found that the defendant's sudden reach for the gun after hearing someone enter the room suggested that the killing was the result of a "sudden and unconsidered" impulse.<sup>114</sup> The conviction, therefore, was for second-degree murder because the killing was purposeful, but lacking in both premeditation and provocation.

Additionally, in *People v. Pacheco*, the defendant was convicted of second-degree murder because he failed to produce sufficient

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107. *See id.* at 545, 219 P.2d at 5.

108. *See id.* at 544–45, 219 P.2d at 5–6.

109. *See People v. Ashland*, 20 Cal. App. 168, 175, 128 P. 798, 801–02 (1912).

110. 99 Cal. App. 2d 10, 221 P.2d 190 (1950).

111. *See id.* at 11–12, 221 P.2d at 191.

112. *See id.* at 14, 221 P.2d at 192.

113. *See id.* at 13, 221 P.2d at 192.

114. *Id.*



evidence of provocation for a lesser conviction of voluntary manslaughter.<sup>115</sup> The defendant engaged in an argument with his girlfriend's first husband. The argument resulted in the first husband's death.<sup>116</sup> The defendant stabbed the unarmed, first husband forty-five times.<sup>117</sup> The first husband's arms and hands contained stab wounds, indicating that he tried to shield himself from the attack.<sup>118</sup> Although the defendant claimed that finding his girlfriend with her lover (her first husband) was adequate provocation sufficient to arouse the passions of a reasonable man, the court found this to be insufficient proof of provocation.<sup>119</sup> Rather, the defendant, deemed the first aggressor by the jury, engaged in a brutal fight with a man with whom he had a peaceful encounter that same evening.<sup>120</sup> Therefore, the defendant was guilty of second-degree murder because he purposefully killed without provocation.

## 2. Jury instructions

A trial court must give a second-degree murder instruction if evidence of provocation would allow a jury to infer that the defendant formed a purpose to kill as a direct response to the provocation.<sup>121</sup> Likewise, if sufficient evidence exists to justify a finding of premeditation, as well as a finding that the defendant possessed a purpose to kill without premeditation, the court must give the jury a second-degree murder instruction.<sup>122</sup>

Courts supply second-degree murder instructions where evidence can reveal either the occurrence of a first-degree or second-degree murder. In *People v. Wickersham*, the trial court failed to give the jury a second-degree murder instruction where the defendant shot her husband during a scuffle that occurred after her husband saw

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115. 116 Cal. App. 3d 617, 627, 172 Cal. Rptr. 269, 274 (1981).

116. *See id.* at 622-24, 172 Cal. Rptr. at 271-73.

117. *See id.* at 624, 172 Cal. Rptr. at 272.

118. *See id.*

119. *See id.* at 627, 172 Cal. Rptr. at 274.

120. *See id.*

121. *See People v. Wickersham*, 32 Cal. 3d 307, 330, 650 P.2d 311, 323, 185 Cal. Rptr. 436, 448 (1982), *overruled by* *People v. Barton*, 12 Cal. 4th 186, 906 P.2d 531, 47 Cal. Rptr. 2d 569 (1995) (overruled only on the grounds that "unreasonable self-defense" is a "defense").

122. *See id.*

the gun.<sup>123</sup> Although sufficient evidence existed to justify a finding of first-degree murder, “such a finding was not compelled.”<sup>124</sup> According to the same facts, the jury could have found that the defendant did not premeditate the murder, but acted impulsively in response to the scuffle.<sup>125</sup> In effect, the defendant could have had a purpose to kill her husband, while not acting upon adequate provocation or with premeditation.<sup>126</sup>

### C. Provocation

Manslaughter is “the unlawful killing of a human being without malice.”<sup>127</sup> “Malice is presumptively absent when [a] defendant[, in response to sufficient provocation,] acts upon a sudden quarrel or heat of passion . . . .”<sup>128</sup> A person who purposefully kills another as a result of provocation is guilty of voluntary manslaughter, not murder.<sup>129</sup>

#### 1. The elements

Defining provocation is not easy. Rather than provide a succinct definition, California courts often define provocation by example—by what does or does not constitute provocation. Despite this confusion, provocation can be broken down into three basic elements. First, provocation is an action, caused by the victim, which causes a reasonable person to lose self-control and act rashly. This action must be caused by the victim, or the defendant must

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123. *See id.* at 329, 650 P.2d at 313–14, 185 Cal. Rptr. at 438–39.

124. *Id.* at 330, 650 P.2d at 323, 185 Cal. Rptr. at 448.

125. *See id.* at 329–30, 650 P.2d at 323, 185 Cal. Rptr. at 448.

126. *See People v. Jeter*, 60 Cal. 2d 671, 676, 388 P.2d 355, 358, 36 Cal. Rptr. 323, 326 (1964) (trial court erred in giving only first degree murder instructions where the defendant shot and killed his victim during a robbery, for a reasonable jury could have concluded that defendant purposefully killed his victim without deliberation).

127. CAL. PENAL CODE § 192 (1999).

128. *People v. Lee*, 20 Cal. 4th 47, 59, 971 P.2d 1001, 1007, 82 Cal. Rptr. 2d 625, 631 (1999). An “unreasonable, but good faith, belief that deadly force is necessary [for] self defense” can also mitigate a crime to voluntary manslaughter. *Id.*; *see also* CAL. PENAL CODE § 192(a) (1999) (defining voluntary manslaughter as the “unlawful killing of a human being . . . upon a sudden quarrel or heat of passion.”).

129. *See People v. Lasko*, 23 Cal. 4th 101, 108, 999 P.2d 666, 671, 96 Cal. Rptr. 2d 441, 446 (2000).

reasonably believe the victim engaged in the provocative conduct.<sup>130</sup> Second, the conduct must be sufficiently provocative such that it would encourage a reasonable person of average disposition to act without consideration.<sup>131</sup> The victim's conduct can be physical or verbal,<sup>132</sup> and thus, no specific type of provocation is required for a court to mitigate a crime to voluntary manslaughter. Third, at the time of the killing, the defendant must be in an actual heat of passion; he must act from passion, not from judgment.<sup>133</sup> The

130. See *Lee*, 20 Cal. 4th at 59, 971 P.2d at 1007, 82 Cal. Rptr. at 631; see also *In re Thomas C.*, 183 Cal. App. 3d 786, 798, 228 Cal. Rptr. 430, 438 (1986); *People v. Brooks*, 185 Cal. App. 3d 687, 694, 230 Cal. Rptr. 86, 89 (1986).

131. See *Lee*, 971 P.2d at 1007, 82 Cal. Rptr. at 631; see also *People v. Berry*, 18 Cal. 3d 509, 515, 556 P.2d 777, 780, 134 Cal. Rptr. 415, 418 (1976). "To satisfy the objective or 'reasonable person' element of this form of voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.'" *Wickersham*, 32 Cal. 3d at 326, 650 P.2d at 321, 185 Cal. Rptr. at 446 (citing *People v. Seden*, 10 Cal. 3d 703, 719, 518 P.2d 913, 923, 112 Cal. Rptr. 1, 11 (1974) (overruled on other grounds)).

132. See *Berry*, 18 Cal. 3d at 515, 556 P.2d at 780, 134 Cal. Rptr. at 418 (1976).

133. See *People v. Barton*, 12 Cal. 4th 186, 201, 906 P.2d 531, 540, 47 Cal. Rptr. 2d 569, 578 (1995). See also CALJIC No. 8.42 (2002), which states:

To reduce an unlawful killing from murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.

The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up [his][her] own standard of conduct and to justify or excuse [himself][herself] because [his][her] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him][her] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. [Legally adequate provocation may occur in a short, or over a considerable, period of time.]

The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment.

If there was provocation, [whether of short or long duration,] but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to

aroused passion may be a result of rage, or it can consist of any violent, intense emotion.<sup>134</sup> Aside from the above elements, there must be a lack of cooling time. If sufficient time exists between the provocative conduct and the killing, the law presumes that the defendant should have cooled off—as the reasonable person would have—thus precluding mitigation to voluntary manslaughter.

*a. applying the elements*

“[P]rovocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment.”<sup>135</sup> Courts have found that a separated spouse in a romantic relationship with another is insufficient provocation to inflame the passions of a reasonable person. In *People v. Lujan*, for example, the court found that the defendant did not kill as a result of provocation.<sup>136</sup> The defendant and his wife were separated, but he continually stalked and harassed her.<sup>137</sup> After watching his wife walking and talking with another man, the defendant bludgeoned both of them to death.<sup>138</sup> The defendant did not act upon a heat of passion because neither victim engaged in any provocative conduct;<sup>139</sup> a separated woman in a romantic relationship with a man other than her husband is not a sufficiently provocative action.<sup>140</sup> The court also found that this conduct should not arouse a person to act rashly.<sup>141</sup> The defendant and his wife were separated, and a police officer warned the defendant that he must stay clear of his wife.<sup>142</sup> The defendant’s rash temptation to kill was not reasonable, and thus the court refused to mitigate the crime to voluntary manslaughter.

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subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter.

134. *See Lasko*, 23 Cal. 4th at 108, 999 P.2d at 670, 96 Cal. Rptr. 2d at 446.

135. *Lee*, 20 Cal. 4th at 60, 971 P.2d at 1008, 82 Cal. Rptr. at 632.

136. 92 Cal. App. 4th 1389, 112 Cal. Rptr. 2d 769 (2001).

137. *See id.* at 1412, 112 Cal. Rptr. 2d at 786–87.

138. *See id.* at 1414, 112 Cal. Rptr. 2d at 788.

139. *See id.*

140. *See id.* at 1415, 112 Cal. Rptr. 2d at 789.

141. *See id.*

142. *See id.*

Courts also find the predictable conduct of a victim resisting the crime to be insufficient provocation.<sup>143</sup> In *People v. Williams*, the court properly refused voluntary manslaughter instructions where the defendant shot his two victims.<sup>144</sup> The victims allegedly robbed the defendant's home.<sup>145</sup> After his wife threatened to leave him over the event, the defendant went to the victims' home, engaged in an argument with them, and then shot them.<sup>146</sup> The defendant maintained that the victims' statement, "we didn't rob you on Saturday, Kerry did," was adequate provocation justifying the reduction of his conviction to voluntary manslaughter.<sup>147</sup> The court, however, disagreed because dialogue between a victim and her attacker is not adequate provocation.<sup>148</sup>

*b. timing*

Generally, provocation requires a lack of cooling time between the provocative conduct and the killing. If sufficient time has elapsed between the provocation and the killing, courts will presume that the defendant's passions have cooled, thereby precluding a finding of provocation. No specific time limit, however, needs to exist to prohibit a finding of provocation. Rather, courts take an ad hoc approach, examining each case to determine if sufficient time has passed to enable a reasonable person's passions to subside.

In *People v. Brooks*, for example, the court found adequate provocation despite a two-hour period between the provocative conduct and the killing.<sup>149</sup> The defendant's brother was stabbed to death.<sup>150</sup> The defendant, "in a very excited, upset state, was running around talking to people," trying to ascertain who murdered his

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143. See *People v. Williams*, 40 Cal. App. 4th 446, 454, 46 Cal. Rptr. 2d 730, 734 (1995); see also *People v. Jackson*, 28 Cal. 3d 264, 306, 618 P.2d 149, 169-70, 168 Cal. Rptr. 603, 623-24 (1980) (holding that the defendant's brutal attack and killing of one of his elderly victims when she awakened during the robbery and began to scream was a predictable reaction of a resisting victim and not a sufficient provocation to reduce a murder charge to manslaughter).

144. 40 Cal. App. 4th 446, 454-55, 46 Cal. Rptr. 2d 730, 734 (1995).

145. See *id.* at 451, 46 Cal. Rptr. 2d at 732.

146. See *id.* at 452, 46 Cal. Rptr. 2d at 733.

147. See *id.* at 453, 46 Cal. Rptr. 2d at 733.

148. See *id.* at 454-55, 46 Cal. Rptr. 2d at 734.

149. 185 Cal. App. 3d 687, 230 Cal. Rptr. 86 (1986).

150. See *id.* at 690, 230 Cal. Rptr. at 86.

brother.<sup>151</sup> The defendant finally determined who shot his brother and shot that person five times.<sup>152</sup> Even though two hours had passed between his brother's murder and the victim's murder, there was substantial evidence that the defendant killed in a heat of passion.<sup>153</sup>

Provocation, however, can occur over a long period of time and can include any kind of high-wrought emotion. In *People v. Borchers*, the court found sufficient evidence of provocation where the defendant was involved in a relationship with a woman who admitted infidelity, constantly threatened to commit suicide, and repeatedly urged the defendant to shoot her by calling him "chicken."<sup>154</sup> A chain of events over a considerable length of time can cause a defendant to act rashly and without consideration.<sup>155</sup> The court held that passion does not need to be rage or anger, but can consist of any violent or intense emotion.<sup>156</sup> Thus, sufficient evidence existed for a finding of provocation—that the defendant "killed in wild desperation induced by [the victim's] long continued provocatory conduct."<sup>157</sup>

Provocation can also take the form of a long, smoldering accumulation of provocation inciting rage and passion. In *People v. Berry*, a forty-six-year-old defendant married a twenty-year-old woman, who left for Israel three days after their marriage.<sup>158</sup> The defendant maintained that upon her return, she announced that she had met another man abroad, fallen in love with him, and engaged in sexual intercourse with him.<sup>159</sup> Over the next two weeks, the victim allegedly provoked the defendant with sexual taunting, alternating between inviting his sexual advances and rejecting them.<sup>160</sup> The situation purportedly culminated in a screaming match followed by the defendant strangling the victim. The court held that a "cumulative series of provocations" coupled with the final screaming

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151. *Id.* at 691, 230 Cal. Rptr. at 87.

152. *See id.* at 690, 230 Cal. Rptr. at 87.

153. *See id.* at 696, 230 Cal. Rptr. at 90.

154. 50 Cal. 2d 321, 328–29, 325 P.2d 97, 102 (1958).

155. *See id.*

156. *See id.*

157. *Id.*

158. 18 Cal. 3d 509, 512, 556 P.2d 777, 778, 134 Cal. Rptr. 415, 416 (1976).

159. *See id.* at 513, 556 P.2d at 779, 134 Cal. Rptr. at 417.

160. *See id.* at 513–14, 556 P.2d at 779, 134 Cal. Rptr. at 417.

fit could cause a person to kill in an uncontrollable rage "under the sway of passion."<sup>161</sup> Ultimately, on retrial, the defendant was convicted of second-degree murder.

*c. intent to kill?*

While most killings that result from provocation involve a purpose to kill, a heat of passion killing may also not be purposeful. An individual in the heat of passion can merely intend to scare or cause injury to the victim, but his actions may still result in death.<sup>162</sup> At a minimum, these cases involve recklessness—acting despite an awareness of a substantial and unjustifiable risk. Nonetheless, a heat of passion killing performed with the intent to scare or injure is considered voluntary manslaughter.

A purpose to scare, as opposed to a purpose to kill, was sufficient to convict the defendant in *People v. Lasko* of voluntary manslaughter.<sup>163</sup> The defendant was found guilty of provocation even though he did not purposefully kill the victim.<sup>164</sup> The defendant killed the victim over a money quarrel which developed into a brutal fight.<sup>165</sup> The defendant maintained that he unintentionally killed the victim with a bat only as a response to the victim hitting him with the same bat.<sup>166</sup> The court held the defendant guilty of voluntary manslaughter despite an absence of a purpose to kill because a conviction of voluntary manslaughter does not require a purpose to kill.<sup>167</sup> California Penal Code section 192 defines manslaughter as an unlawful killing without malice. It further defines voluntary manslaughter as a killing resulting from a sudden heat of passion.<sup>168</sup> The statute, however, says nothing about a purpose to kill.<sup>169</sup> A killer "who acts in a sudden quarrel or heat of passion lacks malice

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161. *Id.* at 514, 556 P.2d at 779, 134 Cal. Rptr. at 418.

162. *See People v. Barton*, 12 Cal. 4th 186, 906 P.2d 531, 47 Cal. Rptr. 2d 569 (1995).

163. *See Lasko*, 23 Cal. 4th 101, 999 P.2d 666, 96 Cal. Rptr. 2d 441.

164. *See id.* at 104, 999 P.2d at 668, 96 Cal. Rptr. 2d at 443.

165. *See id.* at 105–06, 999 P.2d at 668–69, 96 Cal. Rptr. 2d at 443–44.

166. *See id.*

167. *See id.* at 108, 999 P.2d at 620, 96 Cal. Rptr. 2d at 445.

168. *See id.*; *see also* CAL. PENAL CODE § 192 (1999).

169. *See Lasko*, 23 Cal. 4th at 108, 999 P.2d at 671, 96 Cal. Rptr. 2d at 446.

and is therefore not guilty of murder, irrespective of the presence or absence of an intent to kill.”<sup>170</sup> The court in *Lasko* further stated:

Just as an unlawful killing *with* malice is murder regardless of whether there was an intent to kill, an unlawful killing without malice (because of a sudden quarrel or heat of passion) is voluntary manslaughter, regardless of whether there was an intent to kill. In short, the presence or absence of an intent to kill is not dispositive of whether the crime committed is murder or the lesser offense of voluntary manslaughter.<sup>171</sup>

Thus, a purpose to kill, although often present, is not a necessary element of provocation. Mere recklessness is sufficient.

## 2. Burden of proof

Provocation holds a unique place in the law. Unlike most crimes which are comprised of elements which need to be established to prove the crime, provocation merely mitigates an unlawful, intentional homicide. Provocation, standing alone, does not establish or increase criminal liability.<sup>172</sup> In effect, what distinguishes murder from manslaughter is not the elements of a crime, but rather the mitigating factor of provocation. Thus, provocation resembles an affirmative defense. Unless the prosecution's case makes it apparent that the murder was committed upon sufficient provocation, the defendant has the burden of production—the defendant must raise the issue of provocation.<sup>173</sup>

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170. *Id.* at 109, 999 P.2d at 671, 96 Cal. Rptr. 2d at 447.

171. *Id.* at 109–10, 999 P.2d at 671, 96 Cal. Rptr. 2d at 447. Although some courts appear to have held to the contrary, that voluntary manslaughter requires an intent to kill, none expressly have held that “a defendant who kills in a sudden quarrel or heat of passion, with conscious disregard for life but without intent to kill, is guilty of murder.” *Id.* at 110; *see also* *People v. Hawkins*, 10 Cal. 4th 920, 958, 897 P.2d 574, 595–96, 42 Cal. Rptr. 2d 636, 657–58 (1995); *People v. Ray*, 14 Cal. 3d 20, 28, 533, 897 P.2d 1017, 1021, 120 Cal. Rptr. 377, 381 (1975); *People v. Forbs*, 62 Cal. 2d 847, 852, P.2d 825, 828, 44 Cal. Rptr. 753, 756, 402 (1965); *People v. Brubaker* 53 Cal.2d 37, 44, 346 P.2d 8, 12 (1959); *People v. Gorshen*, 51 Cal.2d 716, 732–33, 336 P.2d 492 (1959); *People v. Bridgehouse*, 47 Cal.2d 406, 413, 303 P.2d 1018, 1022 (1956); *People v. Bender*, 27 Cal. 2d 164, 181, 163 P.2d 8, 18 (1945).

172. *See* *People v. Rios*, 23 Cal. 4th 450, 459, 2 P.3d 1066, 1072, 97 Cal. Rptr. 2d 512, 519 (2000).

173. *See id.* at 461–62, 2 P.3d at 1074, 97 Cal. Rptr. 2d at 521.



The prosecution then has the burden of proving the absence of provocation beyond a reasonable doubt.<sup>174</sup>

In *People v. Dixon*, for example, the defendant failed to meet his burden of showing both adequate provocation and heat of passion evidence.<sup>175</sup> In that case, the defendant shot a prostitute in the back after she did not follow through with her agreement to produce sexual favors for cocaine.<sup>176</sup> The defendant did not provide testimony as to the time that elapsed between when the victim received the cocaine and when she refused sexual favors.<sup>177</sup> In addition, the defendant did not provide adequate testimony to establish that the provocation at issue was sufficient to arouse the passions of an ordinary, reasonable person.<sup>178</sup> The court found that the refusal of sexual activity as payment for drugs did not constitute the provocative conduct necessary to mitigate murder to voluntary manslaughter.<sup>179</sup> Thus, the court was not required to provide a manslaughter instruction because the defendant failed to meet his burden of offering substantial evidence of provocation.<sup>180</sup>

### 3. Jury instructions

The court has the obligation to give jury instructions on lesser offenses when the evidence raises a question as to whether all of the necessary elements of the crime are met<sup>181</sup>—regardless of whether the defendant requests the lesser offense instructions.<sup>182</sup> If there is no evidence of provocation, then the court does not have the obligation to give instructions for the lesser offense of voluntary manslaughter.<sup>183</sup> To warrant voluntary manslaughter instructions, the evidence of provocation must be “substantial enough to merit

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174. *See id.*; *see also* *People v. Sedeno*, 10 Cal. 3d 703, 719, 518 P.2d 913, 923, 112 Cal. Rptr. 1, 11 (1974); *People v. Spurlin*, 156 Cal. App. 3d 119, 123–24 (1984).

175. 32 Cal. App. 4th 1547, 38 Cal. Rptr. 2d 859 (1995).

176. *See id.* at 1551, 38 Cal. Rptr. 2d at 860.

177. *See id.* at 1555, 38 Cal. Rptr. 2d at 863.

178. *See id.* at 1555–56, 38 Cal. Rptr. 2d at 864 (citations omitted).

179. *See id.* at 1556, 38 Cal. Rptr. 2d at 864.

180. *See id.*

181. *See* *People v. Breverman*, 19 Cal. 4th 142, 154, 960 P.2d 1094, 1100, 77 Cal. Rptr. 2d 870, 876 (1998).

182. *See id.*

183. *See id.*

consideration.”<sup>184</sup> This is to ensure that the defendant is only convicted of the crime he actually committed.

In *People v. Breverman*, for example, substantial evidence of provocation existed to require voluntary manslaughter instructions.<sup>185</sup> A group of people charged the defendant’s car while he attempted to enter it.<sup>186</sup> The group was large, mob-like, and armed with dangerous weapons.<sup>187</sup> The group further intimidated the defendant when they challenged him to fight and damaged his car.<sup>188</sup> These circumstances indicated to the court that a jury could infer from the evidence that the defendant was blinded by a sudden heat of passion when he shot towards the mob and killed the victim.<sup>189</sup> Thus, the court was obligated to give voluntary manslaughter instructions.

Even if the defendant requests that the court abstain from giving instructions on the lesser offense, the court must still supply the instructions if substantial evidence of the lesser crime exists. In *People v. Barton*, the defendant contended that he shot his victim accidentally.<sup>190</sup> The defense requested the trial court omit voluntary manslaughter instructions for tactical reasons; the defense believed that because voluntary manslaughter required a purpose to kill,<sup>191</sup> the court’s instructions that the jury convict the defendant of voluntary manslaughter if it found that the killing occurred upon a sudden heat of passion were inconsistent with the defense’s assertion that the killing was accidental.<sup>192</sup> The court, however, held the instruction appropriate. There was a substantial question as to whether the elements of murder existed, thus requiring instructions of the lesser offense.<sup>193</sup>

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184. *Id.* at 162, 960 P.2d at 1106, 77 Cal. Rptr. at 882 (citations omitted).

185. *See id.* at 163–64, 960 P.2d at 1107, 77 Cal. Rptr. 2d at 883.

186. *See id.*

187. *See id.*

188. *See id.*

189. *See id.*; *see also* Self Defense, *infra* Part IX.

190. *See Barton*, 12 Cal. 4th 186, 192, 906 P.2d 531, 533, 47 Cal. Rptr. 2d 569, 571 (1995).

191. In most instances, including *Barton*, a provocation theory presumes a purpose to kill even though it is not legally required.

192. *See id.* at 193–94, 906 P.2d at 534, 47 Cal. Rptr. 2d at 572.

193. *See id.* at 194, 906 P.2d at 534, 47 Cal. Rptr. 2d at 572.

On the other hand, in *People v. Fenenbock*, substantial evidence of provocation did not exist to merit a voluntary manslaughter instruction.<sup>194</sup> In that case, a group of people brutally murdered their victim out of revenge for the sexual molestation of one of the defendant's children.<sup>195</sup> The defendant's reason was not obscured by passion because after hearing about the molestation, the defendant continued with his daily activities and did not confront the victim.<sup>196</sup> The defendant's passions had cooled, and the killing became an act of revenge, not passion.<sup>197</sup> As a result, the court affirmed the trial court's omission of a provocation instruction because insufficient evidence existed that the defendant had acted in a heat of passion.

Thus, provocation requires an action that is caused by the victim, which causes the defendant to passionately lose self-control and act rashly without judgment. The victim's conduct, whether physical or verbal, must be such that it could cause an individual to lose control. Moreover, at the time of the killing, the defendant must be in an actual heat of passion. Finally, there must be a lack of cooling time between the provocative conduct and the killing. Otherwise, courts will presume that a reasonable person should have cooled off, thus precluding mitigation to voluntary manslaughter.

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194. 46 Cal. App. 4th 1688, 54 Cal. Rptr. 2d 608 (1996).

195. *See id.* at 1695-96, 54 Cal. Rptr. 2d at 612.

196. *See id.* at 1704, 54 Cal. Rptr. 2d at 617.

197. *See id.*; *see also* *People v. Golsh*, 63 Cal. App. 609, 617, 219 P.2d 456, 459 (1923).

## IV. MENS REA: UNINTENTIONAL HOMICIDE\*

Part III discussed criminal liability for homicide where there is a purpose to kill. Part IV will discuss three different theories under which a defendant can be held liable for an unintentional killing.

*A. Second-Degree Murder Under an Implied Malice Theory*

A defendant can be convicted of murder if he does an act that involves a strong probability of death to another and death results.<sup>1</sup> As this Part will illustrate, murder liability can attach even where a defendant does not possess an intent to kill.<sup>2</sup> Malice can be implied in this type of killing where the defendant's conduct is so wanton and reckless as to demonstrate a depraved heart or an extreme indifference to human life.<sup>3</sup>

The following paragraphs illustrate how a defendant's reckless conduct can make him liable for murder under the "implied malice" murder theory. Other jurisdictions have coined this type of unintended homicide "depraved heart murder." The Model Penal Code classifies an unintended killing as a murder when the killing is committed recklessly under circumstances that show an extreme indifference to human life.<sup>4</sup> California discusses the same type of killing under second-degree murder within an "implied malice" theory. Therefore, "unintentional murder, whether it is called 'depraved heart,' 'implied malice,' or given some other label, centers

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\* Amanda Gamer: J.D. Candidate, May 2004, Loyola Law School; B.A., Theater, UCLA. To my brother for inspiring me to follow my dreams, my father for teaching me to live life to the fullest, my grandparents for encouraging me to dance and be artistic, and my mother for being my best friend and biggest fan. You have all blessed my heart and supported me through all of my endeavors.

1. See 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW ELEMENTS § 195 (3d ed. 2000) [hereinafter 1 WITKIN CAL. CRIM. LAW ELEMENTS].

2. See *id.*

3. See *id.*

4. See MODEL PENAL CODE § 210.2(1)(b) (1980).

around a very risky act that causes the death of another, even though the defendant does not intend to kill.”<sup>5</sup>

### 1. The nature of implied malice

A defendant is guilty of murder, under some circumstances, if he intentionally acts in a manner that involves a high probability of death to another.<sup>6</sup> The way that this idea works in practice is complicated. Courts have held that malice is implied when the defendant's conduct is wanton and reckless and suggests an “abandoned and malignant heart.”<sup>7</sup> The phrases “abandoned and malignant heart,” and “implied malice” lead to complexities in defining “murder.” Therefore, it is necessary to define the terms that are invoked in this area of homicide and use those terms consistently. For the purposes of this Part, the necessary level of culpability for implied malice murder is “recklessly.” Before defining the term recklessly, however, it is important to illustrate California's terminology in its implied malice murder jurisprudence.

Courts have adopted two approaches to find implied malice. In reality, they lead to the same result, which is discussed in the following subpart. One line of cases finds implied malice where the defendant—with a base, antisocial motive, and a wanton disregard for human life—completes an act which involves a high probability that death will result.<sup>8</sup> Another line of cases finds implied malice where a killing results from a dangerous act that is deliberately performed by a defendant who knows that his conduct endangers

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5. Charles L. Hobson, *Reforming California's Homicide Law*, 23 PEPP. L. REV. 495, 540–41 (1996) (citation omitted).

6. See 1 WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 1, § 195.

7. CAL. PENAL CODE § 188 (West 1999) (defining malice as express or implied: “It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.”); *see also*, Hobson, *supra* note 5, at 495 (describing the evolution of the definition of malice, and how its modern form is “completely divorced from any common sense notion of ill will.” For that reason, an alternative definition of malice is necessary.).

8. *See, e.g.*, *People v. Gilbert*, 63 Cal. 2d 690, 703–04, 408 P.2d 365, 373–74, 47 Cal. Rptr. 909, 917–18 (1965).

human life.<sup>9</sup> That is, the killing results from the defendant's conscious disregard for life.

*People v. Watson* adopted the following definition: Implied malice exists "when a person does an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."<sup>10</sup> Therefore, malice may be implied when the defendant unintentionally kills as a result of his reckless conduct.<sup>11</sup> In this Part, the Model Penal Code's definition for recklessly will be employed in order to illustrate the mens rea for implied malice murder.<sup>12</sup> A person acts recklessly when he consciously disregards a substantial and unjustifiable risk to life, and thus demonstrates extreme indifference to the value of life.<sup>13</sup>

## 2. Three elements of second-degree murder under an implied malice theory

As stated above, a defendant is guilty of murder if he acts recklessly and causes a death, even if he does not have an intent to kill.<sup>14</sup> Practitioners and jurors should think of this type of murder as requiring the following three elements: (1) An act that is dangerous to life; (2) The defendant is aware of an unjustifiable risk; and (3) The defendant acts anyway, showing a conscious disregard for the unjustifiable risk.<sup>15</sup> These elements of implied malice murder must be shown in order to hold a defendant liable for an involuntary killing.<sup>16</sup>

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9. See, e.g., *People v. Phillips*, 64 Cal. 2d 574, 586, 414 P.2d 353, 359, 51 Cal. Rptr. 225, 231 (1966), *overruled on other grounds by*, *People v. Flood*, 18 Cal. 4th 470, 957 P.2d 869, 76 Cal. Rptr. 2d 180 (1998).

10. 30 Cal. 3d 290, 300, 637 P.2d 279, 285, 179 Cal. Rptr. 43, 49 (1981).

11. See *id.*

12. See MODEL PENAL CODE § 2.02(2)(c) (1999).

13. See *id.*

14. See generally 1 WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 1, § 195.

15. See *id.*

16. See *id.* § 195 (describing the many different ways that California case law has attempted to define this unintentional murder under the depraved heart murder theory).

*a. elements of implied malice murder in application*

*i. act dangerous to life*

*People v. Nieto Benitez* posed the question of whether the act of brandishing a firearm is sufficiently dangerous to life to support a conviction under the implied malice murder theory.<sup>17</sup> The defendant was charged with second-degree murder after he fatally shot a man who spilled food on his shirt and then refused to clean it.<sup>18</sup> The court instructed the jury to find malice based on the defendant's intentional brandishing of a firearm—an intentional act dangerous to human life. The defendant was then convicted under the implied malice murder theory.<sup>19</sup>

In *Nieto Benitez*, the court used California jury instruction 8.31 to instruct the jury on what constitutes second-degree murder under an implied malice murder theory.<sup>20</sup> The court instructed the jury that the term "intentional act" should be construed in accordance with everyday language, and that "act" refers to an act from which death results.<sup>21</sup> Such an act could be pulling a handgun in a particular manner, shooting a gun, or similar acts because it is common knowledge that guns are dangerous.<sup>22</sup> Furthermore, all of the events leading up to the death in this case—the dispute, the threats, and the retrieval of extra ammunition—"justifiably could lead a jury to reach

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17. 4 Cal. 4th 91, 840 P.2d 969, 13 Cal. Rptr. 2d 864 (1992).

18. *See id.* at 97–98, 840 P.2d at 971–72, 13 Cal. Rptr. 2d at 866.

19. *See id.* at 96–97, 840 P.2d at 970–71, 13 Cal. Rptr. 2d at 865.

20. *See id.* at 113, 840 P.2d at 892, 13 Cal. Rptr. 2d at 877 (Mosk, J., concurring). CALJIC No. 8.31 reads:

Murder of the second degree is [also] the unlawful killing of a human being when: 1. The killing resulted from an intentional act, 2. The natural consequences of the act are dangerous to human life, and 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being.

California Court Jury Instructions no. 8.31 (6th ed. 1996) [hereinafter CALJIC].

21. *See Nieto Benitez*, 4 Cal. 4th at 111, 840 P.2d at 981, 13 Cal. Rptr. 2d at 876.

22. *See id.* at 113, 840 P.2d at 982, 13 Cal. Rptr. 2d at 877 (Mosk, J., concurring).

a verdict different from one which might be reached in a case involving an accidental shooting during a friendly hunt for wild game.”<sup>23</sup> Therefore, the defendant’s brandishing of the firearm in a dangerous manner was sufficient to satisfy the dangerous-to-life requirement of second-degree murder under an implied malice theory.<sup>24</sup>

Currently, a new instruction is given in the context of implied malice with respect to surgical procedures. For example, in *People v. Brown*, the defendant surgeon was convicted of second-degree murder under an implied malice murder theory.<sup>25</sup> There, the victim suffered from apotemnophilia.<sup>26</sup> The victim learned of the defendant through a newspaper article about transsexual surgery and believed the surgeon might be willing to amputate his leg.<sup>27</sup> The defendant did indeed remove the seventy-nine-year-old victim’s leg.<sup>28</sup> Earlier, the victim had told the surgeon that he suffered from a heart condition.<sup>29</sup> The surgeon completed the surgery despite his

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23. *Id.* at 108, 840 P.2d at 978, 13 Cal. Rptr. 2d at 873.

24. *See id.* at 113–14, 840 P.2d at 982–83, 13 Cal. Rptr. 2d at 877–78 (Mosk, J., concurring). Justice Mosk’s concurring opinion illustrates the confusion in describing this category of acts, and explains the legislature’s intended definition:

In 1983 the Legislature adopted the “high probability of death/natural consequences” standard this court set forth in *Watson* for implied malice. Therefore, even if I agreed with amicus curiae the State Public Defender that the “high probability of death” language requires a graver act than the “natural consequences dangerous to life” language, and believed that the Legislature’s original “abandoned and malignant heart” formulation also set a high standard for the necessary physical act, my view would be purely academic, for the Legislature has decided that the two phrases are synonymous.

*Id.*

Therefore, the current version of the instruction and the 1983 version articulate the same standard, but the current version is in more straightforward terms. *See id.* The court urged the trial courts to adopt the clearest language describing the requirements of implied malice—i.e., the *Watson* court’s formulation that the act must have carried a “high probability that death would result.” *Id.*

<sup>26</sup> 91 Cal. App. 4th 256, 259, 109 Cal. Rptr. 2d 879, 881 (2001).

26. *See id.* Apotemnophilia is the desire to have a limb amputated. Surgeons in the United States will not amputate the limbs of apotemnophiliacs. *See id.*

27. *See id.* at 260, 109 Cal. Rptr. 2d at 881.

28. *See id.* at 260, 109 Cal. Rptr. 2d at 882.

29. *See id.* at 260, 109 Cal. Rptr. 2d at 881.



awareness of the unjustifiable risk to the victim's health.<sup>30</sup> That risk was unjustified not only because the surgery was unnecessary, but also because the defendant's act was dangerous to life since he was aware of the victim's heart condition. The victim developed gangrene and died two days after the surgery.<sup>31</sup>

The defendant in *Brown* argued that the current jury instruction on implied malice was misleading when applied to an implied malice murder resulting from surgery.<sup>32</sup> He further alleged that the jury should have been provided with the 1983 version of the instruction, which stated that the act must have been "done for a base, antisocial purpose and with a wanton disregard for human life."<sup>33</sup> His reasoning was that there was evidence that all surgical procedures, even the simplest, are potentially life-threatening.<sup>34</sup> However, the court rejected the argument that the inherent dangers of surgery required the requested modification of the jury instruction.<sup>35</sup> Consequently, the court held that the trial judge did not err in giving the current version of the instruction.<sup>36</sup> *Brown* is also relevant to the next section, which deals with awareness of unjustifiable risk. Nevertheless, here, malice could be implied because the defendant realized the unjustifiable risk of his actions, and acted in total disregard of the danger to the victim's life.<sup>37</sup> This case illuminates the idea that there is a lot of conduct beyond brandishing weapons, shooting guns, and fighting that is dangerous to life. Although failed surgery normally does not trigger a murder prosecution, *Brown* indicates that a surgeon who acts recklessly—with an extreme indifference to human life—may be found guilty of murder under an implied malice murder theory.

## ii. awareness of unjustifiable risk

If a person is aware of and realizes the unjustifiable risk attached to his conduct, yet acts in conscious disregard of the danger to life,

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30. See *id.* at 260–61, 109 Cal. Rptr. 2d at 882.

31. See *id.* at 261, 109 Cal. Rptr. 2d at 882.

32. See *id.* at 268–69, 109 Cal. Rptr. 2d at 887–88.

33. *Id.*

34. See *id.* at 268, 109 Cal. Rptr. 2d at 888.

35. See *id.* at 268–69, 109 Cal. Rptr. 2d at 888.

36. See *id.* at 270, 109 Cal. Rptr. 2d at 889.

37. See *id.* at 268, 109 Cal. Rptr. 2d at 887.

his crime is murder under the implied malice murder theory.<sup>38</sup> This Section focuses on what is needed to show that the defendant was aware of an unjustifiable risk. This awareness element requires defendant's subjective understanding that his behavior is reckless or dangerous to life.<sup>39</sup> Subjective awareness, however, does not require an understanding or knowledge that someone will die.

Unjustifiable risk is further defined in the Model Penal Code's definition of the term "recklessly."<sup>40</sup> That definition of recklessness is probably the best known and most widely accepted. Under the Model Penal Code, the actor's risk is unjustified where, considering the nature of the conduct and the circumstances known to the actor, the actor's conduct demonstrates a gross deviation from the standard that a law-abiding person would observe if placed in the same situation.<sup>41</sup> For example, a police officer who is driving at extremely high speeds is taking a risk, but the risk is justified if he is speeding in pursuit of someone who has committed a crime. On the other hand, a civilian who is speeding because he is racing with his friends is taking a risk that is unjustified. If that civilian were to cause death due to his reckless driving, it is possible that he could be found guilty of second-degree murder under the implied malice murder theory.

In *People v. Watson*, a drunk driver was convicted of murder.<sup>42</sup> The court found that the defendant was aware of danger to life because he drove his car to a bar, knowing that he would be driving later.<sup>43</sup> This court also presumed that the defendant was aware of the dangers of drunk driving.<sup>44</sup> Therefore, even absent an intent to kill, the defendant was held liable because he behaved recklessly under circumstances which showed an extreme indifference to human life.

The awareness element is also applicable in cases where the defendant is liable because of an omission to act. In *People v. Burden*, the defendant was convicted of second-degree murder after

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38. See CALJIC, *supra* note 20, no. 8.51.

39. See generally, *People v. Dellinger*, 49 Cal. 3d 1212, 783 P.2d 200, 264 Cal. Rptr. 841 (1989) (discussing whether implied malice requires a finding of the defendant's subjective awareness or appreciation of the life-threatening risk created by his conduct).

40. See MODEL PENAL CODE § 2.02(2)(c) (1962).

41. See *id.*

42. 30 Cal. 2d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981).

43. See *id.*

44. See *id.*

his five-month-old son died from malnutrition and dehydration.<sup>45</sup> The defendant was aware during the last two weeks of the child's life that the child was starving to death.<sup>46</sup> On appeal, the court affirmed his second-degree murder conviction.<sup>47</sup> "[T]he common law does not distinguish between homicide by act and homicide by omission."<sup>48</sup> In *Burden*, the evidence demonstrated that the defendant failed to feed the infant despite his awareness that the baby was starving.<sup>49</sup> Applying the subjective awareness element to this case, a law-abiding person in the defendant's situation, aware that his child was starving, would not take the unjustified risk of withholding food from the child. The defendant was aware that his child could starve or become extremely malnourished. His lack of concern demonstrated recklessness and was substantial evidence of an extreme indifference to human life, making him liable for second-degree murder under an implied malice murder theory.

iii. conscious disregard of unjustifiable risk

The next two cases concern implied malice and intoxication. Defendants who kill as a result of their intoxication act recklessly. They exhibit an extreme indifference to human life, and thus can be guilty of murder even though they do not possess an intent to kill.

In *People v. Albright*, the court convicted the defendant of second-degree murder under an implied malice theory.<sup>50</sup> The court reached that conclusion because the defendant operated a motor vehicle after he had willfully consumed alcoholic beverages to the point of intoxication in conscious disregard for the safety of others.<sup>51</sup>

In *Albright*, the defendant drank at least eight beers before he drove between 90 and 110 miles per hour down a street in a small town.<sup>52</sup> He entered an intersection and crashed into the victim,

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45. 72 Cal. App. 3d 603, 606, 140 Cal. Rptr. 282, 283 (1977).

46. *See id.* at 609, 140 Cal. Rptr. at 284-85.

47. *See id.* at 621, 140 Cal. Rptr. at 293.

48. *Id.* at 618, 140 Cal. Rptr. at 290-91.

49. *See id.* at 609, 140 Cal. Rptr. at 284-85.

50. 173 Cal. App. 3d 883, 884, 219 Cal. Rptr. 334, 335 (1985).

51. *See id.* at 886-87, 219 Cal. Rptr. at 336-37.

52. *See id.* at 884, 219 Cal. Rptr. at 335.

killing him instantly.<sup>53</sup> The defendant told police that “he had tried to kill himself and had not meant to hurt anyone else.”<sup>54</sup>

Even though the defendant had no intent to kill, he could still be convicted of second-degree murder under the implied malice murder theory.<sup>55</sup> The court focused on the conscious disregard element of the crime. It stated that a defendant exhibits a conscious disregard of the safety of others when he willfully drinks alcohol to the point of intoxication, knowing that he thereafter must drive a car—thus combining impaired physical and mental abilities with a “vehicle capable of great force and speed . . . .”<sup>56</sup> The court concluded:

Intoxicated and possibly attempting suicide, defendant bolted at about 100 miles per hour through a residential area, passing three cars but smashing into the last. Defendant knew other people were on the road, and must have known of the high probability he would cause death if he continued his conduct and hit another car. His gamble that no one would enter his path killed a young man; it also rendered him guilty of second degree murder.<sup>57</sup>

*People v. Olivas* is another example of a defendant acting with a conscious disregard for life.<sup>58</sup> The court convicted the defendant of second-degree murder, without finding any intent to kill, where defendant led police on a deadly high speed chase.<sup>59</sup> The court found that a vehicular homicide committed while intoxicated involved implied malice. The court also found that such a vehicular homicide was second-degree murder if a person knew that his act endangered the life of another, yet acted with conscious disregard for life.<sup>60</sup> The defendant had consumed the drug PCP, which impaired his physical and mental faculties.<sup>61</sup> He drove at extremely high speeds, creating an unjustifiable risk.<sup>62</sup> His near misses with other

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53. *See id.* at 885, 219 Cal. Rptr. at 335.

54. *Id.*

55. *See id.* at 886–87, 219 Cal. Rptr. at 336–37.

56. *Id.* at 887, 219 Cal. Rptr. at 336–37.

57. *Id.*

58. 172 Cal. App. 3d 984, Cal. Rptr. 567 (1985).

59. *See id.* at 986, 218 Cal. Rptr. at 568.

60. *See id.* at 987, 218 Cal. Rptr. at 569 (citing *People v. Watson*, 30 Cal. 3d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981)).

61. *See id.* at 986, 218 Cal. Rptr. at 568.

62. *See id.* at 989, 218 Cal. Rptr. at 570.

cars and his willful avoidance of pursuing police cars showed that he was aware of this risk, yet he continued his reckless driving.<sup>63</sup> It did not matter whether the defendant took the PCP knowing that he would later drive.<sup>64</sup> What mattered was that at the time of the fatal accident, the defendant acted purposefully with “conscious disregard for a known, life-threatening risk.”<sup>65</sup>

### *B. Provocative Act Murder Doctrine*

“In a provocative act murder, neither the defendant nor the defendant’s accomplice kill or intend to kill.”<sup>66</sup> Instead, the killer is a third party, and the victim is usually an accomplice or an innocent bystander.<sup>67</sup> Provocative act murder is a form of implied malice murder, originally derived from the felony-murder rule.<sup>68</sup> This type of homicide follows logically after implied malice murder because they share generally the same mens rea requirements. The difference is that in provocative act murder, liability attaches because of a particular causal pattern involving a defendant’s action and a third party reaction that kills the victim. Normally homicides falling under this doctrine are murder in the second-degree under the implied malice theory. However, in a few instances, the doctrine operates within a different context analogous to that of first-degree felony-murder.<sup>69</sup>

#### 1. How provocative act murder doctrine is triggered

“Under the provocative act murder doctrine, the perpetrator [or instigator] of a crime is held vicariously liable for the killing,” absent an intent to kill, when a third party kills the perpetrator’s accomplice, or target.<sup>70</sup> Provocative act murder does not require that either the defendant or his accomplices have an intent to kill.<sup>71</sup> In fact, neither

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63. *See id.*

64. *See id.* at 988, 218 Cal. Rptr. at 570.

65. *Id.* at 989, 218 Cal. Rptr. at 570.

66. 1 WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 1, §§ 192, 195.

67. *See id.*

68. *See* CAL. PENAL CODE § 187 (West 2003).

69. *See infra* note 100.

70. *People v. Briscoe*, 92 Cal. App. 4th 568, 581–83, 112 Cal. Rptr. 2d 401, 411–14 (2001); *People v. Aurelio*, 167 Cal. App. 3d 52, 57, 212 Cal. Rptr. 868, 870 (1985).

71. *See Aurelio*, 167 Cal. App. 3d at 57, 212 Cal. Rptr. at 870.

the defendant nor his accomplice needs to pull the trigger.<sup>72</sup> Rather, to invoke the provocative act doctrine, a third party actually fires the shot that results in the death of either the defendant's accomplice or an innocent bystander.<sup>73</sup>

## 2. The requirements of provocative act murder

The provocative act murder doctrine requires the prosecution to establish that the defendant committed a dangerous act (*actus reus*), and that it was highly probable a third party would react in a life-threatening manner (*mens rea*). Under the doctrine, *actus reus* requires that the defendant or an accomplice "commit[s] an act which provokes a third party into firing the fatal shot."<sup>74</sup> Furthermore, *mens rea* is established where "the defendant or his [accomplice knows] this act has a 'high probability' . . . of eliciting a life threatening response from the third party."<sup>75</sup> "[A] 'foreseeable possibility' of eliciting a life-threatening response from a third party" is not sufficient to satisfy the *mens rea* requirement.<sup>76</sup> In addition, the prosecution must establish that the defendant's conduct, rather than the conduct of the third party who actually fired the fatal shot, proximately caused the killing.<sup>77</sup> The relevant California jury instruction states:

[H]omicide committed during the commission of a crime by a person who is not a perpetrator of such crime, in response to an intentional provocative act by a perpetrator of the crime other than the deceased [perpetrator], is considered in law to be an unlawful killing by the surviving perpetrator[s] of the crime.<sup>78</sup> To qualify as a provocative act, the felon's conduct must be sufficiently provocative of [a] lethal response to support a finding of implied malice.<sup>79</sup>

In order to prove this crime, the California jury instructions require proof of each of the following elements:

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72. *See id.*

73. *See id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *See CALJIC, supra* note 20, no. 8.12.

78. *Id.*

79. *See id.*

1. The crime of \_\_\_\_\_ [or] attempted \_\_\_\_\_] was committed;
2. During the commission of the crime, a [surviving perpetrator] [the defendant] also committed an intentional provocative act;
3. [The victim of the \_\_\_\_\_] [a peace officer] [another person not a perpetrator of the crime of \_\_\_\_\_] in response to the provocative act, killed [a perpetrator of such crime] [another person] [a fetus];
4. The [defendant's] [surviving perpetrator's] commission of the intentional provocative act was a cause of death of \_\_\_\_\_ (name of the deceased).<sup>80</sup>

Provocative act murder, therefore, is similar to second-degree murder under an implied malice theory in that it requires a dangerous act, performed with a conscious disregard for human life. The difference is that the perpetrator of the intentionally provocative act is liable for a killing even though a third party, rather than the perpetrator, actually committed the killing.

### 3. Provocative act murder and the problem of causation

What makes provocative act murder so unique is that it is a doctrine through which a defendant can be convicted of murder for a killing that was actually committed by someone else. Usually in provocative act murder cases, the liability attaches to an instigator where a third party kills either the instigator's accomplice, target or rival. *Pizano v. Tulare County* illustrates such a causal pattern.<sup>81</sup>

In *Pizano*, two men forcefully entered a house shared by Vaca and Coverdell.<sup>82</sup> The neighbors' children informed their parents that two masked men had entered Vaca's house.<sup>83</sup> The neighbor went to Vaca's house, kicked the door halfway open, and saw the two men, one of whom had a pistol.<sup>84</sup> The co-defendant, Esquivel, mistook the neighbor for a policeman, grabbed Vaca, and stated that he would shoot Vaca if the police intervened. Pizano, the co-defendant, and

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80. *Id.*

81. 21 Cal. 3d 128, 131, 577 P.2d 659, 661, 145 Cal. Rptr. 524, 526 (1978).

82. *See id.*

83. *See id.*

84. *See id.*

Vaca, then ran out of the house. Not realizing that Vaca was present, the neighbor shot at the co-defendant because the police had not arrived, and he thought that the defendants were robbing the house.<sup>85</sup> When the neighbor recognized Vaca and ceased fire, Vaca was already mortally wounded by the neighbor's shot.<sup>86</sup> Esquivel was tried separately and found guilty of first-degree murder. The prosecution successfully argued that liability should not depend on the state of mind of the person firing "the fatal shot but on the conduct of the defendant or his accomplice."<sup>87</sup>

Although the court explained that the provocative act murder doctrine is inapplicable to shield cases, *Pizano* is important because it illustrates how the victim's death was proximately caused by the defendant's provocative and reckless conduct rather than by the robbery.<sup>88</sup> Moreover, where the underlying crime, such as robbery, does not involve an intent to kill, mere participation is not sufficient to invoke murder liability.<sup>89</sup> Therefore, according to the provocative act murder doctrine, the provocative act must be greater than the act that is necessary to perform the underlying crime.<sup>90</sup>

It is difficult to determine what is "greater than necessary."<sup>91</sup> "In every robbery the possibility exists that a victim will resist and kill."<sup>92</sup> Once the robbery is in progress, the robber has little control over such a killing.<sup>93</sup> Thus, one can argue that imposing an additional penalty for the killing improperly discriminates between robbers solely on the basis of a victim's response to the robber's conduct.<sup>94</sup> For a defendant's act to be sufficiently provocative for a finding of implied malice, the defendant must have acted in furtherance of an underlying crime that was dangerous to life and in

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85. *See id.*

86. *See id.*

87. *Id.* at 137, 577 P.2d at 664, 154 Cal. Rptr. at 529.

88. *See id.* at 132, 577 P.2d at 661, 145 Cal. Rptr. at 526.

89. *See People v. Briscoe*, 92 Cal. App. 4th 568, 112 Cal. Rptr. 2d 401 (2001).

90. *See id.* at 582-83, 112 Cal. Rptr. 2d at 412.

91. *Id.*

92. *See id.* at 583, 112 Cal. Rptr. 2d at 413.

93. *Id.*

94. *See id.*



a manner beyond that which is necessary to accomplish the underlying offense.<sup>95</sup>

However, in cases in which the underlying crime does not involve an intent to kill, it is still difficult to determine what is "greater than that necessary."<sup>96</sup> Through its decision of the proximate cause requirement for provocative act murder, the court in *People v. Cervantes* illustrates the difficulty in determining the appropriate mens rea for the provocative act murder doctrine.<sup>97</sup> In essence, the defendant must commit an extremely reckless act, and the act must actually cause others to respond in a deadly manner.

*People v. Cervantes* is distinguished from other provocative act murder cases because in *Cervantes*, "the actual murderers were not responding to the defendant's provocative act by shooting back at him or an accomplice in the course of which someone was killed."<sup>98</sup> The murderers in *Cervantes* were not in the shoes of the police officers in *People v. Gilbert*. There, the police officers responded reasonably to the dilemma when they returned gunfire and killed the defendant's accomplice.<sup>99</sup> *Cervantes* can be further distinguished because (1) the defendant, Cervantes, was not the initial aggressor in the original altercation, (2) the victim was not involved in the original altercation, (3) there was no evidence that the "Alley Boys" who killed the victim were present at the original altercation, and (4) the defendant was not present when the victim was shot.<sup>100</sup> Thus,

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95. *See id.* Provocative act murder requires implied malice. "Malice may be implied if the defendant commits an act with a high probability that it will result in death and does so with a base antisocial motive . . . . [T]he defendant's conduct [must be] sufficiently provocative of a lethal response" for the necessary implied malice to attach and therefore furnish a finding of guilt on a murder charge. *Id.* (emphasis omitted).

96. *Id.*

99. 26 Cal. 4th 860, 862, 29 P.3d 225, 227, 111 Cal. Rptr. 2d 148, 150 (2001). In this case, the defendant, a member of the Highland Street gang, shot a member of the Alley Boys, who was trying to defuse an argument between the defendant and another Alley Boys member. A short time passed and a group of Alley Boys, in retaliation, shot and killed a member of the Highland Street gang. The court found the defendant not guilty of the provocative act murder of the member of his own gang.

98. *Id.* at 872-73, 29 P.3d at 234, 111 Cal. Rptr. 2d at 158.

99. *See id.* at 873, 29 P.3d at 234, 111 Cal. Rptr. 2d at 158 (citing *People v. Gilbert*, 63 Cal. 2d 690, 705, 408 P.2d 365, 374, 47 Cal. Rptr. 909, 918 (1965) (alterations in original)).

100. *See id.* at 872, 29 P.3d at 233, 111 Cal. Rptr. 2d at 157.

the court held that because the victim's murder by other parties was not only felonious, but perpetrated with malice aforethought, and directed at a victim who had no involvement in the original altercation, the case lacked the necessary proximate causation to find the defendant guilty of the murder of his fellow gang member.<sup>101</sup> Therefore, his mere verbal altercation with a rival gang member was not sufficiently reckless, with respect to the likely responses of others, to maintain that he proximately caused the death of his fellow gang member.

4. When provocative act murder doctrine brings a first-degree murder conviction

In *People v. Briscoe*, a jury used the provocative act murder doctrine to convict the defendant of first-degree murder as opposed to second-degree murder under the implied malice theory.<sup>102</sup> The defendant, Briscoe, along with accomplice Pina, went to the victim's home and knocked on the door.<sup>103</sup> The frightened victim, Rozadilla, armed herself with a gun.<sup>104</sup> When Rozadilla's boyfriend, Parovel, returned, Pina and Briscoe told Parovel that they wanted to purchase marijuana.<sup>105</sup> Parovel hid the gun in his clothing.<sup>106</sup> As Parovel was retrieving the marijuana, Pina pointed a semi-automatic pistol at Parovel and demanded his gun from him.<sup>107</sup> Meanwhile, Briscoe returned to the living room, held a .38-caliber handgun to Rozadilla's neck and asked in a very loud voice, "Where's the gun, Bitch?"<sup>108</sup> A fierce struggle ensued between the three men, which eventually led outside the house.<sup>109</sup> Briscoe gained control of the gun. Parovel grabbed for the gun and it went off.<sup>110</sup> Parovel feared for his own life and started shooting.<sup>111</sup> Parovel shot Pina twice.<sup>112</sup> Parovel fled to a neighbor's house to call the police.<sup>113</sup> Pina later died.<sup>114</sup>

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101. *See id.* at 874, 29 P.3d 234, 111 Cal. Rptr. 2d at 158.

102. *Briscoe*, 92 Cal. App. 4th at 576, 112 Cal. Rptr. 2d at 407.

103. *See id.* at 577, 112 Cal. Rptr. 2d at 408.

104. *See id.*

105. *See id.*

106. *See id.*

107. *See id.*

108. *Id.*

109. *See id.*

110. *See id.* at 578, 112 Cal. Rptr. 2d at 408–09.

111. *See id.*

Briscoe's murder charge alleged that Pina's murder was committed during a robbery and burglary, and that Briscoe personally used a firearm in the commission of all three offenses. It did not matter that Briscoe did not actually fire the shot that killed Pina because liability for Pina's death extended to Briscoe under the provocative act murder doctrine.<sup>115</sup> The court explained that more than one act may constitute the proximate cause of a killing.<sup>116</sup> If only one of the defendant's several acts provokes a deadly response, then that is the act that constitutes the provocative act by which the court finds liability.<sup>117</sup> "When the chain of causation is somewhat attenuated, the jury decides whether [the defendant is liable for murder] or not."<sup>118</sup> This fact scenario is similar to felony-murder because a death occurred while defendant was committing an enumerated felony. Instead, the defendant was convicted under the provocative act murder doctrine because of the reckless indifference he demonstrated during his participation in a felony that resulted in death.

##### 5. Second-degree murder conviction under provocative act murder doctrine—in general

In *People v. Aurelio*, the court found the defendant guilty of second-degree murder under a provocative act murder theory for the death of his fellow gang member.<sup>119</sup> The defendant appealed his conviction, based on the grounds that he did not intend to kill his fellow gang member. The court rejected the defendant's argument

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112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.* at 578–80, 112 Cal. Rptr. 2d at 408–11.

116. *See id.* at 584, 112 Cal. Rptr. 2d at 414.

117. *See id.*

118. *Id.*

119. 167 Cal. App. 3d 52, 212, Cal. Rptr. 898 (1985). In this case, the defendant was a member of a juvenile gang and was upset that the previous week, another gang shot one of his fellow members. The defendant and four other members decided to drive into the rival gang's territory and shoot a rival member in revenge. As the defendant and his fellow gang members neared the targeted area, they shot at a station wagon and the station wagon returned fire. During the exchange, bullets from the defendant's car hit a residence whose occupants were also members of the rival gang. The owner of the residence shot back at the car and one of the defendant's fellow gang members was fatally wounded.

because the defendant and his fellow gang members committed a murder that involved an intent to kill.<sup>120</sup> They drove into a rival gang's territory for the specific purpose of shooting someone.<sup>121</sup> Therefore, the court did not question the defendant's liability for the death of his fellow gang member—a death that resulted when the defendant's plans misfired.<sup>122</sup> The defendant's conduct qualified as a provocative act because the act of discharging a weapon at someone both provoked others to return gunfire, and resulted in the death of a co-felon.<sup>123</sup> In other words, the defendant's conduct was sufficiently reckless to support a finding of implied malice under the provocative act murder doctrine because he performed an act dangerous to human life, and he demonstrated extreme indifference to human life. His conduct elicited a deadly response from a third party. Therefore, even though the defendant did not intend to kill his fellow gang member, he could be held liable for the victim's death by a third party because defendant's reckless conduct caused the fatal response.

An alternative application of the provocative act murder doctrine is found in *People v. Shamis*.<sup>124</sup> This case is significant because it does not involve fighting, a gun, or a police chase. In *Shamis*, the court invoked the provocative act murder doctrine because someone died as a result of the defendant entering into agreements to defraud insurance companies by staging accidents involving automobiles and big-rig trucks.<sup>125</sup> The court held that the evidence was sufficient to support a finding that the defendant entered into a conspiracy to commit insurance fraud, that the defendant committed an overt act in furtherance of the conspiracy, and that the victim's death was a probable result of the common plan.<sup>126</sup>

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120. See *id.* at 60, 212 Cal. Rptr. at 872. In other words, they did not simply enter a store and waive a gun hoping to simply rob and then leave without firing a shot.

121. See *id.* at 60, 212 Cal. Rptr. at 872.

122. See *id.* at 60–61, 212 Cal. Rptr. at 872–73.

123. See *id.*

124. 58 Cal. App. 4th 833, 68 Cal. Rptr. 2d 388 (1997).

125. See *id.* at 838–39, 68 Cal. Rptr. 2d at 390–91. Even though the defendant did not intend to kill the victim, the defendant is liable for the acts of her co-conspirators which follow “as a probable and natural consequence of the common design, even though [they are] not intended as a part of the original design or common plan.” *Id.* at 843, 68 Cal. Rptr. 2d at 393.

126. See *id.* at 843, 68 Cal. Rptr. 2d at 393–94. The prosecution's evidence showed that the collisions between cars and big-rigs were staged according to a

In *Shamis*, the defendant's actions may seem too attenuated to hold her liable for murder. However, the defendant was responsible for the drivers' actions in driving onto the freeway and leading another car to a position immediately in front of a big-rig truck.<sup>127</sup> The driver's pressing on the brakes in a life-endangering manner was the provocative conduct which substantially contributed to the victim's death.<sup>128</sup> Although it was the driver's conduct that caused the other driver to lose control of the vehicle, the defendant, in her role as a co-conspirator in an insurance fraud scheme, is criminally responsible for the actions of the drivers involved.<sup>129</sup> Having instructed someone to stage an accident, she caused a third party to react in a life-threatening manner. The defendant's conduct was dangerous to life and it involved a conscious disregard for human life. Her instigating conduct triggered a deadly accident, and therefore, she may be held accountable for the killing.

### *C. Involuntary Manslaughter*

A crime is committed when there is an act and an intent, or criminal negligence.<sup>130</sup> A distinguishing factor between murder and involuntary manslaughter is found in California jury instruction 8.51:

If a person causes another's death by doing an act or engaging in conduct in a criminally negligent manner, without realizing the risk involved, he is guilty of involuntary manslaughter. If, on the other hand, the person realized the risk and acted in total disregard of the danger to life involved, malice is implied, and the crime is murder.<sup>131</sup>

This section will discuss the requisite mens rea for involuntary manslaughter<sup>132</sup> and its development in California homicide law.

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particular plan that the defendant had orchestrated even though she was not the driver in either vehicle. See *id.* at 844, 68 Cal. Rptr. 2d at 394.

127. See *id.* at 846, 68 Cal. Rptr. 2d at 396.

128. See *id.*

129. See *id.*

130. See CAL. PENAL CODE § 20 (West 1999).

131. CALJIC, *supra* note 20, no. 8.51.

132. *Id.* at 8.52.

### 1. How courts define involuntary manslaughter

California's Penal Code defines manslaughter as the unlawful killing of a human being without malice.<sup>133</sup> Involuntary manslaughter, however, is a bit more complicated, and thus it is more difficult to define.<sup>134</sup> Judges instruct California jurors that involuntary manslaughter is an "unlawful killing without malice aforethought and without an intent to kill."<sup>135</sup> Specifically, involuntary manslaughter occurs by the commission of an unlawful act, not amounting to a felony; or in the "commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."<sup>136</sup> "Without due caution and circumspection"<sup>137</sup> has the same meaning as "criminal negligence."<sup>138</sup>

### 2. Civil vs. criminal negligence

A person is liable for negligent homicide where there is "aggravated, culpable, gross or reckless negligence."<sup>139</sup> Under the Model Penal Code, "criminal homicide constitutes negligent homicide when it is committed negligently."<sup>140</sup> A person acts negligently, with respect to homicide, when he should be aware of a substantial and unjustifiable risk to human life.<sup>141</sup> The conduct of the accused must be such a departure from the ordinary, prudent, or careful man's conduct under the same circumstances that it shows "disregard of human life or an indifference to consequences."<sup>142</sup>

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133. See CAL. PENAL CODE § 192 (West 1999).

134. See Hobson, *supra* note 5, at 553. In his article, Hobson explains how negligence is primarily analyzed for the purpose of defining civil negligence. See *id.* at 529. He adds that it is more difficult to define criminal negligence because such analysis requires a compromise. See *id.* at 553-54.

135. CALJIC, *supra* note 20, no. 8.45 (2002). Charles Hobson proposes that the various forms of manslaughter in California should be retained because there exist homicides that are less culpable than murder but that still require punishment. See Hobson, *supra* note 5, at 527-28.

136. See CAL. PENAL CODE § 192 (6<sup>th</sup> ed. West 1999).

137. CALJIC *supra* note 20, no. 8.46.

138. *People v. Penny*, 44 Cal. 2d 861, 869, 285 P.2d 926, 931 (1955) (citations omitted).

139. See 26 AM. JUR. *Homicide* § 210 (1940).

140. MODEL PENAL CODE § 210.4 (1980).

141. See MODEL PENAL CODE § 2.02(2)(d) (1985).

142. *Id.*

Simple stupidity, irresponsibility, thoughtlessness, carelessness, or lack of foreseeability, no matter how serious the consequences may be, do not constitute criminal negligence<sup>143</sup>—this would simply be civil negligence. In order to be found guilty, a defendant in an involuntary manslaughter case must demonstrate gross/criminal negligence. That is, the defendant must act in a manner contrary to how a reasonable person would act in similar circumstances. There is no subjective mental state required for a defendant to be guilty of involuntary manslaughter.<sup>144</sup> The accused must be conscious of the probable consequences of his act, and he must disregard the probable consequences at the time of the act or omission.<sup>145</sup>

### 3. What the courts mean by their definitions

The definition of involuntary manslaughter is complicated and can be confusing. A practical way to distinguish involuntary manslaughter from other categories of homicide is to envision the death as a result of a careless killing or due to gross/criminal negligence. *People v. Penny* set forth the standard that is used in California to define negligent homicide.<sup>146</sup> The prosecution must establish (1) that the actor had knowledge, actual or imputed, that his conduct would endanger life, and (2) that the consequences of the negligent act were reasonably foreseeable.<sup>147</sup>

In other words, a person may be held liable for involuntary manslaughter after he acts carelessly by not perceiving a substantial and unjustifiable risk. That is, the defendant should have been aware of a substantial and unjustifiable risk that he took when he acted. A reasonable person in a similar situation would have perceived the risk and would have been more careful.<sup>148</sup>

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143. See *People v. Wells*, 66 N.Y.S.2d 161, 164 (1946).

144. See DOUGLAS DALTON, CALIFORNIA CRIMINAL LAW 5.07(E) (1995).

145. See generally *id.* (describing involuntary manslaughter).

146. *Penny v. Penny*, 44 Cal. 2d 861, 879–80, 285 P.2d 926, 937 (1955) (reversing a conviction of involuntary manslaughter because the jury was not properly instructed according to California Penal Code section 192 as to “what constitutes criminal negligence, or the lack of due caution and circumspection.” (citing 26 AM. JUR. *Homicide* § 210 (1940))).

147. See 26 AM. JUR. *Homicide* § 210 (1940).

148. See MODEL PENAL CODE § 2.02(2)(d) (1985) (see Model Penal Code’s definition of “negligently”).

In *People v. Rodriguez*, the court reversed the defendant's involuntary manslaughter conviction due to a lack of proof of criminal negligence.<sup>149</sup> The prosecution failed to offer evidence that the defendant could have reasonably foreseen that a fire would ignite in her house and burn her toddler to death.<sup>150</sup> The evidence showed, at most, that the defendant was negligent.<sup>151</sup> Mere negligence, however, is not enough to warrant an involuntary manslaughter conviction.<sup>152</sup> There must be gross negligence, which involves a gross deviation from the standard of care of a reasonable person in the same or similar circumstances.

An omission to act may also constitute gross negligence and warrant an involuntary manslaughter conviction. In *People v. Villalobos*, the court explained that the defendant's lawful act of bathing a child was performed in a grossly negligent manner.<sup>153</sup> Failure to use due care in the treatment of one's child is sufficient to constitute involuntary manslaughter resulting from an act or omission.<sup>154</sup>

A person can also be convicted of involuntary manslaughter where he unintentionally causes the death of his victim after committing an assault and battery.<sup>155</sup> In *People v. Morgan*, one such defendant was convicted of involuntary manslaughter.<sup>156</sup> The court found the defendant's intent immaterial, concluding that beyond any

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149. *People v. Rodriguez*, 186 Cal. App. 2d 433, 8 Cal. Rptr. 863 (1960).

150. *See id.* at 440, 8 Cal. Rptr. at 868.

151. *See id.* at 441, 8 Cal. Rptr. at 869.

152. *See id.*

153. 208 Cal. App. 2d 321, 325, 25 Cal. Rptr. 111, 114 (1962). In that case the defendant placed her daughter in a washbasin with only hot water, added some cold water from the kitchen, removed the child from the basin, and put her in the shower where she discovered the child's wrinkled pinkish skin. Knowing that the child's body parts were scorched by hot water, the defendant put the child to bed. The defendant's sister returned to the house, heard the child crying, discovered that the child's skin was peeling, and took the child to the hospital. At the hospital the child was diagnosed with first and second-degree burns. The child later died. *See id.* at 324, 25 Cal. Rptr. at 113.

154. *See id.* at 328, 25 Cal. Rptr. at 115-16.

155. *See People v. Morgan*, 275 Cal. 2d 603, 608, 79 Cal. Rptr. 911, 914 (1969). In this case the defendant repeatedly hit his victim with his hands and fists causing internal bleeding that eventually lead to the victim's death. *See id.* at 605, 79 Cal. Rptr. at 912.

156. *See Morgan* at 604, 79 Cal. Rptr. at 912.



reasonable doubt, the battery led to the victim's death.<sup>157</sup> The defendant could not offer a defense to the manslaughter charge because there was no evidence showing that the defendant was unconscious at the time of the beating.<sup>158</sup>

In a homicide case, a court must give an involuntary manslaughter jury instruction if an intent to kill is absent. In *People v. Welch*, the court reversed the defendant's conviction for voluntary manslaughter because the trial court failed to instruct the jury on involuntary manslaughter, and there was substantial evidence to furnish a finding that the defendant did not intend to kill the victim.<sup>159</sup>

#### 4. Evaluating criminal negligence objectively

Criminal negligence must be evaluated objectively. "[I]f a reasonable person in the defendant's position would have been aware of the risk involved, [courts and juries will presume that a defendant] had such an awareness."<sup>160</sup> Justice Holmes was a proponent of the

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157. *See id.* at 608-09, 79 Cal. Rptr. at 914.

158. *See id.* at 608, 79 Cal. Rptr. at 914.

159. *People v. Welch*, 137 Cal. App. 3d 834, 840-41, 187 Cal. Rptr. 511, 514-15 (1982). In *Welch*, the defendant and the victim got into an altercation at a bar and the victim told the defendant that he would take him outside and "kick his ass." *Id.* at 837, 187 Cal. Rptr. at 513. The defendant suffered from a life-threatening blood condition caused by an accident several years prior. *See id.* at 837, 187 Cal. Rptr. at 512. The defendant testified that he was afraid that he would die if the victim performed his threats. Therefore, the defendant maintained that he acted in self-defense and was compelled by fear of great bodily harm or death; not with an intent to kill the victim. *See id.* at 840, 187 Cal. Rptr. at 514. The court held that the defendant did not have an intent to kill when he shot the victim and the victim was the aggressor at all times prior to being shot by the defendant. The court further explained that a conviction for involuntary manslaughter is appropriate where the jury finds that the nature of the attack did not justify the resort to deadly force in self-defense or that the force used in self-defense exceeded that which was reasonably necessary to repel the attack. *See id.* at 838, 187 Cal. Rptr. at 513. The problem in this case, however, was that the appropriate jury instruction was not given. *See id.* at 841, 187 Cal. Rptr. at 515.

160. *People v. Watson*, 30 Cal. 3d 290, 296, 637 P.2d 279, 283, 179 Cal. Rptr. 43, 47 (1981) (citing *Weber v. Pinyan*, 9 Cal. 2d 226, 70 P.2d 183 (1931) (emphasis in original)). Charles Hobson analyzes current jurisprudence on the question of reasonableness:

The courts operate under the illusion that the primary difference between implied malice and involuntary manslaughter is the subjective standard of the former and the objective standard of the

idea that negligence should be subjected to an objective standard.<sup>161</sup> He said:

[T]he object of the law is to prevent human life from being endangered or taken; and that, although it so far considers blameworthiness in punishing as not to hold a man responsible for consequences which no one, or only some exceptional specialist, could have foreseen, still the reason for this limitation is simply to make a rule which is not too hard for the average member of the community. As the purpose is to compel men to abstain from dangerous conduct, and not merely to restrain them from evil inclinations, the law requires them at their peril to know the teachings of common experience, just as it requires them to know the law.<sup>162</sup>

This explanation, along with the involuntary manslaughter category of homicide, is especially important because the law seeks to prevent harm irrespective of any actual *purpose* to cause it. This is illustrated in *People v. Albritton*.<sup>163</sup> In *Albritton*, the victim died as a result of the shaken baby syndrome after the defendant father shook the infant victim.<sup>164</sup> The court found that the defendant “did not intend to kill [the child,] but [nevertheless] caused her death by committing child abuse” in violation of California Penal Code section 273(a), (b).<sup>165</sup> The defendant was convicted of “one count of

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latter. This simply cannot be. It ignores the fact that in most cases the perpetrator will subjectively know what a reasonable person would know . . . . The reports are full of involuntary manslaughter cases in which there must have been a subjective appreciation of the risk. A better way to differentiate between unintentional murder and negligent manslaughter is the inherent risk of the conduct that caused the death.

Hobson, *supra* note 5, at 495.

161. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 479 (Richard A. Epstein et al. eds., 5th ed. 1989).

162. *Id.* at 480.

163. 67 Cal. App. 4th 647, 79 Cal. Rptr. 2d 169 (1998).

164. See *id.* at 656, 79 Cal. Rptr. 2d at 174-75.

165. California Penal Code section 273(a), (b) states: “Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child’s death, shall be punished . . . .” CAL. PENAL CODE § 273(b) (West 1999).

involuntary manslaughter . . . and one count of assault on a child with force likely to produce great bodily injury resulting in death.”<sup>166</sup> The prosecution’s only burden was to establish that a reasonable person, in the defendant’s situation, would know that the force used on the baby was likely to cause great bodily injury. “[The victim in this case] had retinal hemorrhages and severe brain swelling [which are signs] common in babies who have been shaken.”<sup>167</sup> The defendant maintained that he was simply trying to shake her so that she would start crying because she had been unconscious after she fell off the bed.<sup>168</sup> Because he was in a state of panic, he could not remember how hard he shook the child.<sup>169</sup> However, to convict a defendant of involuntary manslaughter, the jury has to determine only that a reasonable person would believe that the force was likely to result in great bodily injury.<sup>170</sup> In *Albritton*, the killing was in the commission of the unlawful act of child abuse, under circumstances that were dangerous to human life. Thus, the defendant could be found guilty of involuntary manslaughter and child abuse, regardless of his intent or lack thereof.<sup>171</sup> Because substantial evidence supported both the involuntary manslaughter charge, and the child abuse charge, there was no inconsistency in rendering the two verdicts.<sup>172</sup>

Likewise, a mother’s failure to act in an objectively reasonable manner in caring for her child led to an involuntary manslaughter prosecution in *Walker v. Superior Court of Sacramento County*.<sup>173</sup> There, the defendant did not physically apply force to the child, but she exposed the child to harm by neglecting to seek necessary medical treatment for her child’s flu-like symptoms. Walker moved to dismiss the prosecution because of her belief that healing through prayer was the appropriate treatment for her child.<sup>174</sup> Her motion

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166. *Albritton*, 67 Cal. App. 4th at 651, 79 Cal. Rptr. 2d at 171.

167. *Id.* at 652, 79 Cal. Rptr. 2d at 172.

168. *See id.* at 653, 79 Cal. Rptr. 2d at 173.

169. *See id.*

170. *See id.* at 655, 79 Cal. Rptr. 2d at 174.

171. *See id.* at 651, 79 Cal. Rptr. 2d at 171.

172. *See id.* at 656, 79 Cal. Rptr. 2d at 174.

173. 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988).

174. Samuel H. Pillsbury highlights this case in his book entitled *Judging Evil: Rethinking the Law of Murder and Manslaughter*. He states:

“To most in contemporary America, Ms. Walker’s belief that disease

was unsuccessful. The child died from meningitis because the mother, a member of the Church of Christian Science, chose to treat the child's illness with prayer instead of appropriate medical treatment.<sup>175</sup>

"The relevant inquiry... turned not on the defendant's subjective intent to heal her daughter but on the objective reasonableness of her course of conduct."<sup>176</sup> In Walker's defense, she summoned an accredited Christian Scientist prayer practitioner to supervise her child's condition.<sup>177</sup> In a pretrial review of Walker's charge, the California Supreme Court rejected Walker's defense of good motive and allowed for the involuntary manslaughter prosecution to continue. The court held that the defendant exercised extreme carelessness when she failed to take the child to a doctor. Thus, the defendant exposed herself to prosecution for involuntary manslaughter.<sup>178</sup>

*Walker* is distinguishable from *Rodriguez*, where the court reversed an involuntary manslaughter conviction of a woman who left her children in a home that subsequently caught fire, killing one

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[should be] treated by prayer and not medicine is crazy. . . If we were to take a utilitarian approach to punishment, the case is a fairly simple one. Parents like Walker may be strongly encouraged to seek medical treatment for children by the threat of punishment." Pillsbury then questions the deserved punishment for homicide and asks if Walker's failure to seek medical attention demonstrated a "moral indifference" to her child. Pillsbury sees this as a "case of tragically misguided concern rather than of culpable indifference." SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER*, 186-87 (1998). Pillsbury proposed a reform to the definition of involuntary manslaughter based on an indifference approach to culpability—he suggests:

Involuntary manslaughter should be defined as follows:

A person is guilty of involuntary manslaughter who causes the death of another by the disregard of a substantial, unjustified, and reasonably apparent risk to human life, under circumstances that demonstrate a basic lack of concern for the welfare of others.

*Id.* at 184.

175. See *Walker*, 47 Cal. 3d at 119, 763 P.2d at 855, 253 Cal. Rptr. at 4.

176. *Id.* at 137, 763 P.2d at 868, 253 Cal. Rptr. at 17.

177. See *id.* at 119, 763 P.2d at 855. 253 Cal. Rptr. at 4

178. See *id.*

child.<sup>179</sup> In *Rodriguez*, the mother's conduct was not sufficiently careless to warrant a finding of criminal or gross negligence.<sup>180</sup> In contrast, the mother in *Walker* failed to seek medical attention for her daughter, who had been ill throughout a seventeen-day period.<sup>181</sup> In terms of unreasonableness, the court found that her action was "plainly more egregious than the decision of Mrs. Rodriguez to leave her children alone at home for an afternoon."<sup>182</sup>

##### 5. The "should be aware" element of involuntary manslaughter

As discussed previously, more than ordinary negligence is necessary to satisfy the requirements of involuntary manslaughter. An act constitutes criminal negligence if a prudent man would foresee that the act would cause a high risk of death or great bodily harm.<sup>183</sup> This is a hotly contested issue in nearly all negligence cases. Therefore, it is important to consider whether a person should either be aware of an unjustifiable risk, or should have knowledge of that risk.<sup>184</sup>

In *People v. Oliver*, the prosecution established that the defendant had knowledge of an unjustifiable risk of harm to the defendant, and the court consequently convicted her of involuntary manslaughter.<sup>185</sup> The sequence of events is of particular importance. The defendant, Oliver, became friendly with the victim at a bar.<sup>186</sup> They both went to the defendant's house, where the victim injected himself with heroin in the defendant's bathroom.<sup>187</sup> After the victim collapsed on the defendant's floor, the defendant instructed her daughter to drag the victim outside, where he was found dead the next day.<sup>188</sup> At trial, the evidence showed: (1) that the defendant

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179. See *People v. Rodriguez*, 186 Cal. App. 2d 433, 441, 8 Cal. Rptr. 863, 868-69 (1960).

180. See *id.*

181. See *Walker*, 47 Cal. 3d at 138, 763 P.2d 852 at 869, 253 Cal. Rptr. at 18.

182. *Id.*

183. See *Rodriguez*, 186 Cal. App. 2d at 440, 8 Cal. Rptr. at 868.

184. See *id.* at 440-41, 8 Cal. Rptr. at 868-69.

185. 210 Cal. App. 3d 138, 258 Cal. Rptr. 138 (1989).

186. See *id.* at 143, 258 Cal. Rptr. at 140.

187. See *id.*

188. See *id.* at 144, 258 Cal. Rptr. at 140.

knew that the victim requested a spoon in order to shoot-up heroine, (2) that the defendant gave the victim a spoon, (3) that the victim injected heroin into his arm, and (4) that the victim fell unconscious and collapsed.<sup>189</sup> As a result, the court determined that there was sufficient evidence to establish that the defendant intended to facilitate the victim's drug use.<sup>190</sup>

Determining whether the defendant's failure to call for medical help rose to criminal or gross negligence required the court to consider whether a reasonable person, in the defendant's circumstances, would have reasonably known that the victim was in danger of death or great bodily harm.<sup>191</sup> Furthermore, the circumstances that the court may consider include—but are not limited to—the intoxicated state of the victim due to his alcohol intake, and his apparent state of sleep. Ultimately, the defendant's knowledge of the victim's intoxicated state, combined with the defendant's failure to aid the victim, amounted to gross negligence, and subjected the defendant to liability for the victim's death.

#### 6. A nuance—"fist blow" cases and involuntary manslaughter

Mens rea and criminal intent play an interesting role in cases where a moderate fist blow causes an unforeseeable death. A common factual scenario involving fatalities from ordinary fist blows raises significant issues about this doctrine.

In *People v. Cox*, the California Court of Appeal affirmed the defendant's involuntary manslaughter conviction for a death that he caused as a result of a battery.<sup>192</sup> The defendant struck the victim's head after a confrontation regarding the defendant's ex-girlfriend, who was the victim's girlfriend at the time.<sup>193</sup> Shortly after the confrontation, the victim's girlfriend walked the victim to his motel.<sup>194</sup> The victim was unable to speak clearly.<sup>195</sup> The girlfriend asked the victim if he wanted her to call 9-1-1. He declined her

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189. *See id.* at 143, 258 Cal. Rptr. at 140.

190. *See id.* at 152–53, 258 Cal. Rptr. at 146.

191. *See id.* Footnote 4 further discusses the requirements of the knowledge element of criminal negligence.

192. 63 Cal. App. 4th 974, 976, 75 Cal. Rptr. 2d 12, 14 (1998).

193. *See id.* at 977, 75 Cal. Rptr. 2d at 14.

194. *See id.*

195. *See id.*

offer, went to sleep, and eventually died.<sup>196</sup> The defendant's conviction for involuntary manslaughter was upheld after the Court of Appeal determined that the trial court committed harmless error when it provided the jury with an improper instruction.<sup>197</sup> The court instructed the jury that for purposes of involuntary manslaughter, battery is an inherently dangerous misdemeanor.<sup>198</sup> Because the defendant committed the battery with criminal intent instead of criminal negligence, the "dangerousness of the unlawful act [e.g., battery] is irrelevant."<sup>199</sup> Furthermore, the court found that it is sufficient that the offense is dangerous under the circumstances of its commission.<sup>200</sup>

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196. *See id.*

197. "The trial court instructed the jury that the killing was unlawful if it occurred 'during the commission of a misdemeanor which is inherently dangerous to human life, namely, the offense of Battery . . .'" *Id.* at 978, 75 Cal. Rptr. 2d at 14. Appellant correctly argued that this was an incorrect statement of the law because battery is not an inherently dangerous offense. *See id.* Nevertheless, "it is almost universally held . . . that one is guilty of involuntary manslaughter who intentionally inflicts bodily harm upon another person, as by a moderate blow with his fist, thereby causing an unintended and unforeseeable death to the victim (who, unknown to his attacker, may have a weak heart or a thin skull or a blood deficiency)." *Id.* at 978-79, 75 Cal. Rptr. 2d at 15. (quoting 2 LAFAYETTE & SCOTT, SUBSTANTIVE CRIMINAL LAW § 7.13(d) (1986)).

198. *See id.* at 978-79, 75 Cal. Rptr. 2d at 15. In *People v. Stuart*, 47 Cal. 2d 167, 173, 302 P.2d 5, 9 (1956), the court summarized its analysis by stating, "to be an unlawful act within the meaning of section 192, therefore, the act in question must be dangerous to human life or safety and meet the conditions of section 20." This statement has sufficiently confused involuntary manslaughter law. Courts have interpreted the *Stuart* case as adding a "dangerousness" requirement to the underlying unlawful act. *See id.* at 979, 75 Cal. Rptr. 2d at 15, 1998 Cal. App. LEXIS 408.

199. *Id.* "It has been repeatedly held that where a person, in committing an assault and battery . . . unintentionally causes the death of his victim, the crime is [involuntary] manslaughter." *Id.* This determination does not depend on finding that the battery underlying involuntary manslaughter charge is dangerous. *See id.*

200. *See id.*

## V. CAUSATION IN CALIFORNIA HOMICIDE\*

Causation may be defined as “the *logical* coming together of the mens rea and actus reus, *resulting in a criminal wrong*.”<sup>1</sup> Death must be the logical result of both the intention and action in order for criminal liability to attach.<sup>2</sup> Other elements of the crime of homicide change depending on which level of homicide the defendant is charged with. The element of causation, however, does not change.<sup>3</sup>

Similar to tort law, causation in criminal law is divided into two separate elements: (1) causation-in-fact (also referred to as but-for causation or factual cause); and (2) proximate causation (also defined as legal cause).<sup>4</sup> Causation-in-fact is satisfied if the result would not have occurred without the conduct in question. In other words, “but for the conduct the result would not have occurred.”<sup>5</sup> The doctrine of “but-for” causation, however, is not a common focus in homicide cases where causation is at issue.<sup>6</sup>

Proximate causation, on the other hand, is usually at issue if the element of causation is relevant in a case. This Part will focus primarily on different proximate cause doctrines, and it will provide detailed examples of California jurisprudence in these areas.

Proximate cause is defined differently depending on the circumstances. Because criminal codes rarely define proximate

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1. PAUL E. DOW, CRIMINAL LAW 30 (1985).

2. *See id.*

3. *People v. Harrison*, 176 Cal. App 2d 330, 334, 1 Cal. Rptr. 414, 417.

4. *See* Michael S. Moore, *The Metaphysics of Causal Intervention*, 88 CAL. L. REV 827, 831 (2000).

5. *See* WAYNE R. LAFAYE, PRINCIPLES OF CRIMINAL LAW: CASES COMMENTS AND QUESTIONS 215 (1978).

6. JOHN KAPLAN ET AL., CASES AND MATERIALS IN CRIMINAL LAW 293(4th ed. 2000) (“Surely the notion of but-for causation is ridiculously wide, because it takes us back to Adam and Eve. The criminal’s mother is a but-for causation of his crimes, and so is his grandmother, and all his ancestry to infinity.” (quoting GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW, 379–81 (1983))).



cause, the law surrounding proximate cause is largely defined by case law.<sup>7</sup> Case law commonly defines proximate cause in terms of remoteness (closeness in time and space), foreseeability, and substantiality of causal contribution.<sup>8</sup> Ultimately, in order for proximate cause to be satisfied, the harm to the victim must be a foreseeable consequence of the defendant's act.

Proximate cause, however, is typically subdivided into more discrete categories. Although some courts discuss these categories simultaneously,<sup>9</sup> this Part divides the different components of proximate cause into the following categories: (1) concurrent causation; (2) preexisting condition of the victim; (3) the intervening act doctrine; and (4) the felony-murder doctrine.

The discussion of concurrent causation addresses the different situations where the doctrine is most commonly applied—when a third party or the victim acts simultaneously with the defendant to cause the death of the victim.<sup>10</sup> This Section illustrates the important purpose of concurrent causation through a case analysis.

The discussion of a preexisting condition focuses on the fact that in California, a defendant is commonly held criminally liable in spite of the victim's preexisting condition. This Section also explores examples where the victim's preexisting condition plays an important role in determining the causation issue.

The most comprehensive issue in the causation analysis is the intervening act doctrine. Some theorists argue that the intervening act doctrine should constitute the entire discussion of proximate cause.<sup>11</sup> Because most of the case law that involves issues of causation focuses on the intervening act doctrine,<sup>12</sup> this Section further narrows the intervening act doctrine into more discreet sub-categories. The focus of this Section is on intervening acts by both the victim and third parties. Although some intervening acts are foreseeable—dependent intervening acts—and do not break the causal chain between the defendant's act and the victim's death,

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7. LAFAVE, *supra* note 5, at 215–16.

8. See Moore, *supra* note 4, at 831.

9. Because courts tend to overlap these categories, some cases fall under more than one category and are addressed accordingly.

10. See CALJIC 3.41 (6th ed. 1996).

11. See Moore, *supra* note 4, at 831.

12. See PETER SEAGO, CRIMINAL LAW 47 (2d ed. 1985).

others are independent and superceding acts that break the chain of causation and free the defendant of liability.<sup>13</sup> Each type of intervening act is addressed separately for a better understanding of the court's analysis under the intervening act doctrine.

Finally, this causation discussion addresses the impact of the felony-murder doctrine on the proximate cause analysis. It explains both the wide reach of the felony-murder rule, and its limitations. This Part provides examples where the felony-murder rule is not applicable, yet the defendant is found guilty of the homicide under another proximate cause doctrine.

### A. Proximate Cause

#### 1. Concurrent causation

The doctrine of concurrent causation addresses situations where there may be more than one cause for the homicide.<sup>14</sup> If the conduct of more than one person contributes to the cause of death, each person may be guilty of the homicide if their individual conduct was a substantial factor in the death.<sup>15</sup> Even if there is only one cause of

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13. See *People v. Schmies*, 44 Cal. App. 4th 38, 49, 51 Cal. Rptr. 2d 185, 192 (1996).

14. The following is a good example of a garden variety concurrent cause case: a victim dies from the loss of blood when shot by three defendants who each individually fired a shot at the victim. The three defendants may be criminally liable in each of the following situations: (1) all three wounds were jointly sufficient because no individual wound was sufficient; (2) no individual wound was necessary because each wound was sufficient to cause death by itself (but the three were jointly necessary); or, (3) no wound was individually sufficient, but any two of the wounds were jointly sufficient. See Moore, *supra* note 4, at 860. This scenario is similar in nature to *People v. Lewis*, 124 Cal. 551, 57 P. 470 (1899), where the victim's death resulted from the excessive bleeding of two different wounds. There can be more than one legal cause. For example, if X dies from a combined attack from both A and B, both men could be charged with homicide. If X's wounds, however, were not mortal and B's acts were totally unforeseeable, A's actions are a factual cause of the actus reus of the crime, but only B will be held liable for the death; A is not the legal cause and A did not proximately cause the death. See also PETER SEAGO, CRIMINAL LAW 46-47 (2d ed. 1985).

15. California jury instructions also emphasize that there may be more than one cause for a crime. The instructions explain concurrent cause to mean the following: "When the conduct of two or more persons contributes concurrently as a cause . . . the conduct of each [person] is a cause . . . if that conduct was also a substantial factor contributing to the result." CALJIC 3.41; see, e.g.,

the homicide, as is common in single-fatal-bullet cases, a defendant may be held liable for a victim's death if the defendant's conduct was a substantial factor in the cause of the death.<sup>16</sup>

Moreover, a defendant may be guilty of a homicide even if a victim's actions contributed to the cause of death.<sup>17</sup> The reluctance of the court to attribute any liability to the victim is pervasive throughout the discussion of causation and is addressed further in the proximate cause discussion.<sup>18</sup>

If a third party's actions contribute to the victim's death, each surviving party's conduct may be a substantial factor in causing the death, and both may be held criminally liable.<sup>19</sup> If the victim's death

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People v. Pock, 19 Cal. App 4th 1263, 23 Cal. Rptr. 2d 900 (1993) (upholding a murder conviction even where the jury was unsure of which of the two defendants actually fired the fatal shot).

16. See, e.g., People v. Sanchez, 26 Cal. 4th 834, 845, 29 P.3d 209, 216, 111 Cal. Rptr. 2d 129, 137 (2001). The defendant drove by a house of a rival gang member and shots were exchanged, resulting in the killing of an innocent bystander. *Id.* at 838, 29 P.3d at 211, 111 Cal. Rptr. 2d at 131. The court found that a single stray bullet was the actual cause of death, but could not establish which gang member fired the fatal shot. *Id.* at 838, 29 P.3d at 211–12, 111 Cal. Rptr. at 131. The court did not determine who actually shot the fatal round, but found that defendant's "life-threatening deadly acts" against his rival gang member were a "substantial concurrent, and hence proximate, cause" of the victim's death; the court found both gang members concurrently criminally responsible for first-degree murder. *Id.* at 848–49, 29 P.3d at 218, 111 Cal. Rptr. 2d at 140.

17. See, e.g., Lewis, 124 Cal. at 554, 57 P. at 471. The victim, after being shot by defendant, cut his own throat. The court found that when the victim cut his own throat, he was also dying from the gunshot wound and "[d]rop by drop the life current went out from both wounds, and at the very instant of death the gunshot wound was contributing to the event." *Id.* at 559, 57 P. 470 at 473. For a further discussion of a victim's act to hasten his own death, see *infra* Part III.A.3.a.iii. See also, People v. Scola, 56 Cal. App. 3d 723, 728, 128 Cal. Rptr. 477, 480 (1976) (holding that the defendant's speeding was the proximate cause in the victim's death, although the victim had pulled her car out in front of the defendant); People v. Wattier, 51 Cal. App. 4th 948, 953, 59 Cal. Rptr. 2d 483, 486 (1996) (finding the victim's failure to use a seatbelt was not a concurrent cause of death). In sum, California courts have not found a victim's conduct that contributes to his death to be a substantial factor in bringing about his death that breaks the causal chain and, therefore, have not removed liability from the defendant.

18. This is evident in the discussion of victim suicide and victim's contributory negligence. See *infra* Section A.3.a.iii.

19. See Lewis, 124 Cal. at 559, 57 P. at 473. The court reasoned that if a third party other than the defendant had cut the victim's throat, instead of the

is the result of both the defendant's conduct and another criminal act by a third party or the victim, the court may still find the defendant's action to be the substantial factor in the victim's death.<sup>20</sup> If the other criminal act, however, unrelated to the defendant's conduct, proves to be the substantial factor in the victim's death, the defendant may be absolved of liability for the homicide.<sup>21</sup>

Concurrent causation is an important consideration if there are "simultaneously sufficient conditions" that have caused the death of the victim.<sup>22</sup> This causation doctrine is helpful under certain conditions, but it only applies when a cause is "operative at the moment of death and [if it] acted with another force to produce the death."<sup>23</sup> To the extent that the contributing conduct of the victim or third party occurs after the defendant's initial harmful conduct, concurrent causation is no longer at issue and instead the intervening act doctrine is applied. As a result, concurrent causation serves an important but narrow purpose within the causation doctrine.

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victim inflicting injury on himself, both the defendant and the third party may have been held criminally liable. *Id.* The two parties would have acted independently to contribute to the victim's death, and each could have been found guilty of the homicide. *Id.*

20. *See* *People v. Vernon*, 89 Cal. App. 3d 853, 864, 152 Cal. Rptr. 765, 772 (1979) (Defendant severely beat victim during the course of a robbery. Victim's death resulted from both the beating and by arson committed during the robbery. Defendant's beating of the victim was sufficient to support a first-degree murder conviction.). *Id.*

21. *See* *Lewis*, 124 Cal. at 557, 57 P. at 472 (citing *State v. Scates*, 50 N.C. 420). The victim's death resulted from both a blow to the head and severe burns. The defendant admitted to the burning but not the head injury. The lower court found that the burning was the primary cause of the death and convicted the defendant. *Id.* The appellate court reversed, holding that because the blow may have been the independent act of someone other than the defendant and if the head injury hastened the death, it—and not the burning—was the cause of death. *Id.* Although this case does support the proposition that a third party acting independently of the defendant may be held liable for the homicide, typically a third party's actions are treated as intervening acts that may break the chain of causation and release the defendant from liability. *See infra* A.3.b.i. However, if a defendant acts concurrently with a third party to cause the victim's death, and it is not clear which of the two caused the death, both will be found to be substantial factors that caused the death. Thus, both will be held criminally liable. *See* *Lewis*, 124 Cal. at 559, 57 P. at 473.

22. KAPLAN ET AL., *supra* note 6, at 288.

23. *People v. Sanchez*, 26 Cal. 4th 834, 845, 29 P.3d 209, 216, 111 Cal. Rptr. 2d 129, 137 (2001).

## 2. Preexisting condition of the victim

When a victim's preexisting condition is combined with the defendant's harmful conduct and results in the victim's death, it is likely the court finds the defendant responsible for the victim's death.<sup>24</sup> The courts do not recognize the severity of the preexisting condition; instead, the courts focus on the defendant's conduct as the proximate cause of the injury.<sup>25</sup> Even if the victim is on the verge of death, the defendant is criminally responsible if he accelerates the victim's death in any manner.<sup>26</sup>

If the victim's preexisting physical condition is not the only substantial factor that brings about the death, then the defendant's

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24. California jury instructions further articulate this concept. See CALJIC 8.58:

If a person unlawfully inflicts a physical injury upon another person and that injury is a cause of the latter's death, that conduct constitutes an unlawful homicide . . . even if:

1. The person injured had been already weakened by disease, injury, physical condition or other cause; or
2. It is probable that a person in sound physical condition injured in the same way would not have died from the injury; or
3. It is probable that the injury only hastened the death of the injured person; or
4. The injured person would have died soon thereafter from another cause or other causes.

See also *People v. Moan* 65 Cal. 532, 536, 4 P. 545, 548 (1884) (defendant struck the victim in the head but argued that the victim's death was a result of the victim's chronic alcoholism). The California Supreme Court found that although the victim's alcoholism may have had an effect on the victim's organs, the defendant accelerated the victim's death with the blows to the head, and was therefore responsible for the homicide. See *id.* at 537, 4 P. at 548.

25. See *id.* at 536–37, 4 P. 548–49; see also *People v. Stamp*, 2 Cal. App. 3d 203, 208–09, 82 Cal. Rptr. 598, 601–02 (1969) (asserting that even though the victim had a fatal heart disease, the defendants accelerated his death because the robbery upset his system and caused his fatal seizure. This case also falls within the purview of the felony-murder doctrine and will be discussed. See *infra* Section A.4).

26. See *Moan*, 65 Cal. at 537, 4 P. at 548–49. If a patient is lying in the last stages of consumption, with a tenure upon life that cannot possibly continue for a day, it is homicide to administer a poison to him by which his life is ended almost immediately.”); see also *People v. Phillips*, 64 Cal. 2d 574, 578–79, 414 P.2d 353, 357–58, 51 Cal. Rptr. 225, 229–30 (1966), *overruled on other grounds by* *People v. Flood*, 18 Cal. 4th 470, 957 P.2d 869, 76 Cal. Rptr. 2d 180 (1998) (holding that the defendant who removed terminally ill patient from the hospital shortened her life and hastened her death).

ignorance of the victim's condition will not absolve the defendant from criminal responsibility.<sup>27</sup> The defendant escapes criminal liability for the death only in the rare circumstance where the victim's existing physical condition is found to be the *only* substantial factor that brings about the death.<sup>28</sup>

Even in extreme situations that involve the preexisting condition of the victim, prosecutors may charge the defendant with homicide despite the unusual resulting death.<sup>29</sup> Thus, even if the victim has a very serious preexisting condition, if the defendant's actions hasten the victim's death, it is likely that the defendant is found criminally liable for the homicide.

### 3. The intervening cause doctrine

"Proximate cause is clearly established where the act is directly connected with the injury, with no intervening force operating."<sup>30</sup> Even when there is an intervening cause, however, the defendant may still be held criminally liable.<sup>31</sup>

"Intervening causes . . . are typically described as either 'dependent' or 'independent.'"<sup>32</sup> A dependent intervening cause is one that is a natural and foreseeable result of the defendant's acts, and will not absolve the defendant of criminal liability.<sup>33</sup> An independent intervening cause, on the other hand, will break the causal chain between the defendant's act and the harm to the victim, and it will not result in liability for the defendant.<sup>34</sup> Much of the case

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27. See *Stamp*, 2 Cal. App. 3d at 210, 82 Cal. Rptr. at 603.

28. See B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW ELEMENTS § 38 (2001) [hereinafter CAL. CRIM. LAW ELEMENTS] (defendant not guilty of homicide when victim's death resulted from high blood pressure, pneumonia and stroke and not from being shaken by defendant).

29. See generally, KAPLAN ET AL., *supra* note 6, at 296 (Los Angeles prosecutors charged a rapist with murder in the death of a 79-year old victim whose official cause of death was heart failure and pneumonia. The prosecutor argued that the brutal rape robbed the victim of her "will to live" and the rape hastened her death.).

30. CAL. CRIM. LAW ELEMENTS, § 127 (2000).

31. *People v. Schmies*, 44 Cal. App 4th 38, 48-49, 51 Cal. Rptr. 2d 185, 191 (1996)

32. *Id.* at 49, 51 Cal. Rptr. 2d at 192.

33. *Id.*

34. See *id.*

law concerning the issue of proximate causation includes analysis under the intervening act doctrine.

It is important to emphasize, however, that "there is no bright line demarcating a legally sufficient proximate cause from one that is too remote."<sup>35</sup> The question of sufficient proximate cause is almost always reserved for the jury. The exceptions occur in instances where the cause of death is so unforeseeable that the court may decide that no trier of fact could find the needed nexus between defendant's conduct and the victim's death.

*a. dependent intervening causes*

If the intervening act or cause is reasonably foreseeable, it is not a superceding act, and thus the act does not break the chain of causation. The consequence of the intervening act does not need to be a strong probability—the precise consequence does not have to be foreseen. In some cases, it may be sufficient that "that the defendant should have foreseen the possibility of some harm of the kind which might result from his act."<sup>36</sup>

*i. medical treatment as a dependent intervening act*

Negligent medical treatment may constitute a dependent intervening act.<sup>37</sup> Generally, if the defendant wounds a victim in a manner that is either very dangerous or "calculated to destroy life," the negligence, mistake, or lack of skill by a physician or surgeon that contributes to the victim's death is not a defense to a charge of homicide.<sup>38</sup> Mere negligence in the treating of the wound, even if it is the sole cause of death, is not a defense because it is a foreseeable intervening cause.<sup>39</sup> The California Supreme Court has held that even extreme gross negligence in the medical treatment of an

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35. *Id.* at 48 n.5, 51 Cal. Rptr. 2d at 191 n.5 (quoting *People v. Roberts*, 2 Cal 4th 271, 826 P. 2d 274, 6 Cal. Rptr. 2d 276 (1992)).

36. *Id.* at 50, 51 Cal. Rptr. 2d at 192 (quoting CAL. CRIM LAW ELEMENTS, § 132 (1988)).

37. California jury instructions provide a good overview of the impact of negligent medical treatment on a homicide case. See CALJIC 8.57. If the original injury was the cause of death, even if the immediate cause of death was the medical treatment given to the victim, the defendant is not relieved of responsibility for the death.

38. See *People v. McGee*, 31 Cal. 2d 229, 240, 187 P.2d 706, 712 (1947).

39. See *id.* at 240, 187 P.2d at 713.

otherwise deadly wound inflicted by the defendant does not absolve the defendant of criminal liability.<sup>40</sup>

Medical professionals now receive protections that ensure that their intervening acts are not superseding causes that absolve defendants of liability for criminal conduct. After the California Court of Appeal faced extreme difficulties trying to decide the differences between common law death and brain death,<sup>41</sup> California adopted a "brain death statute"<sup>42</sup> that enables a physician to pronounce a person dead if the physician determines that the person has suffered "a total and irreversible cessation of brain function."<sup>43</sup> Consequently, the common law determination of brain death has been effectively overruled. The statute reflects the policy that the defendant's morally reprehensible behavior is the focal point. Additionally, the statute gives physicians greater leniency with decisions to perform transplant operations and to end life support systems.<sup>44</sup> A physician's actions, however, may be viewed as

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40. *See id.* at 243, 187 P.2d at 714–15. After the defendant shot victim in the abdomen, the victim was taken directly to the hospital but was neglected by the treating surgeon for ten hours even though he was severely hemorrhaging. Although the court found the surgeon's actions to be "grossly contrary to good surgical practice," the delay in treatment was not a foreseeable intervening cause. *Id.* at 243, 187 P.2d at 714; *see also* *People v. Nerida*, 29 Cal. App. 2d 11, 14–15, 83 P.2d 964, 965–66 (1938) (upholding a defendant's guilty verdict of manslaughter for stabbing victim even though victim's immediate cause of death resulted from surgical shock from a major abdominal operation).

41. *See People v. Mitchell*, 132 Cal. App. 3d 389, 396–97 n.4, 183 Cal. Rptr. 166, 170 n.4 (1982) (discussing the conflicting results in *People v. Flores* and *People v. Lyons*). (In *Flores*, after deceased suffered brain death, but before common law death, the surgeons performed a heart transplant operation. Because California did not have a statute defining death, the court held that the surgeons may have caused the death and released defendant. In *Lyons*, however, two days after victim suffered brain death as a result of a gunshot wound, the doctors performed an unsuccessful transplant. After hearing expert testimony regarding brain death, the trial judge ruled that the transplant was not the cause of death because the victim was legally dead before the transplant.). These conflicting opinions meant that depending on the definition of death, one court would find the defendant guilty of murder and another would find only the charge of attempted murder or a much lesser offense. Following these conflicting cases, California enacted the brain death statute to resolve this issue.

42. CAL. HEALTH & SAFETY CODE § 7180 (West Supp. 2003).

43. *Mitchell*, 132 Cal. App. 3d at 397, 183 Cal. Rptr. 166 at 170 (1982).

44. *See id.* at 398, 183 Cal. Rptr. At 171. The victim suffered from "near drowning" and after 10 days of hospitalization was taken off artificial life



independent intervening acts that mitigate the defendant's liability.<sup>45</sup> Current case law dictates that in order for California courts to consider medical treatment as an independent intervening act, the act must be "grossly improper" and the "sole cause of death."<sup>46</sup> Other jurisdictions have applied this criteria and found that grossly negligent medical treatment may absolve the defendant of liability for the death of the victim.<sup>47</sup> Nevertheless, in most situations, negligent medical treatment is a foreseeable dependent intervening act that does not break the causal chain between the defendant's

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support because she suffered irreversible brain damage and was in a vegetative state. See *id.* at 399, 183 Cal. Rptr. at 168-69. The court did not reach the issue of causation because there was no reasonable doubt that the victim was brain dead. See *id.* Note that the issue of denying life-saving treatment is also relevant when the victim, because of her religious beliefs, refuses medical treatment which results in her death. See *R. v. Blane*, [1975] 3 All E.R. 446. For further discussion of this topic please see *infra* Section A.3.a.iii.

45. See *id.* at 397 n.5, 183 Cal. Rptr. at 171 n.5 (discussing *In Re Benjamin C. No. J914419* (L.A. Sup. Ct. 1979) (Although the three-year old victim was hit by a car and suffered irreversible brain damage, his life expectancy on the life support machine was one year, and without the machine, only minutes. The controversy in the case arose over the definition within the brain death stature of "total" cessation of brain function. The court found that the victim fit with the brain death definition but expressed concern over the scope of the definition.)).

46. *People v. Scott*, 15 Cal. 4th 1188, 1215, 939 P.2d 354, 371, 65 Cal. Rptr. 2d 240, 257 (1997). *Id.* at 1199-00, 939 P. 2d at 360-61, 65 Cal. Rptr. 21 at 246-47. Defendant raped, beat and severely burned his victim who died almost a year later. Although the pathologist testified that the death was a result of the severe burns, the defendant argued that the victim's death resulted from the negligent treatment of the treating physician, specifically pertaining to the victim's two cardiac arrests. *Id.* at 1200, 939 P.2d at 361, 65 Cal. Rptr. 2d at 247. Although the court found that the victim would have survived absent the negligence of the physician, it did not find the ordinary negligence to be a superseding cause. *Id.* at 1200, 939 P.2d at 361, 65 Cal. Rptr. 2d at 247. California jury instructions, however, leave open this possibility. See CALJIC 8.57 (6th ed. 1996) ("Where, however, the original injury is not a cause of the death and the death was caused by medical or surgical treatment or some other cause, then the defendant is not guilty of an unlawful homicide.").

47. See *People v. Calvaresi*, 534 P.2d 316, 319 (Colo. 1975). A shooting victim died after a doctor made the "questionable" decision to transfer the patient to another hospital, and the victim died in route. *Id.* at 317. The court held that the gross negligence of the doctor might negate the defendant's liability, even if the negligence was not the sole cause of the victim's death. *Id.* at 319. A search of California case law did not reveal that medical treatment involving gross negligence that was not the sole cause of death could relieve the defendant from liability.

wrongful act and the victim's death. Such proximate cause jurisprudence—which does not place blame on the medical profession—reflects the broader public policy that blame must be placed on the one who is most morally culpable of the crime.

ii. dependent intervening acts of third parties

Intervening acts of third parties can be dependent intervening acts. If the harm that occurs is a reasonably foreseeable consequence of the defendant's conduct at the time that the defendant acts, then the third party's conduct does not break the chain of causation, and thus, the defendant is found criminally responsible for the victim's death.<sup>48</sup> If the third party's actions are not extraordinarily negligent and are a “normal consequence of a situation created by the [defendant],” the third party's actions do not constitute a superseding cause.<sup>49</sup>

In *People v. Schmies*, the defendant fled from an attempted traffic stop and engaged in a high speed chase with the police.<sup>50</sup> During the chase, a police patrol car struck another car, killing its passenger.<sup>51</sup> The officer's conduct was found to be a dependent intervening act, and the defendant was held criminally liable for the death of the victim.<sup>52</sup>

Another example of a dependent intervening act occurs when a third party takes sudden action in an effort to avoid the harmful consequences of the defendant's actions.<sup>53</sup> In *People v. Gardner*, the

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48. See *People v. Schmies*, 44 Cal. App. 4th 38, 49, 51 Cal. Rptr. 2d 185, 192 (1996).

49. See *id.* (quoting RESTATEMENT (SECOND) OF TORTS § 443).

50. See *id.* at 43, 51 Cal. Rptr. 2d at 187.

51. See *id.*

52. See *id.* at 58, 51 Cal. Rptr. 2d at 198. The court, in another case that involved a high speed police chase, came to the same conclusion: “[I]t was probable that his conduct of fleeing from the officer at great speeds along city streets would result in a collision, either of his vehicle or that of the officer, with a pedestrian or a third vehicle.” *People v. Harris*, 52 Cal. App. 3d 419, 426–27 n.2, 125 Cal. Rptr. 40, 45 n.2 (1975).

53. See *People v. Harrison*, 176 Cal. App 2d 330, 336, 1 Cal. Rptr. 414, 418 (1959). During the commission of an attempted robbery one of the robbery victims accidentally shot and killed another innocent victim. The court found that defendants were a proximate cause of the victim's death because the intervening act of the other victim was a foreseeable dependent act. “If a loaded weapon is pointed at another at close range it may be foreseeable that

defendant fired at the victim as the victim ran away.<sup>54</sup> A third party, believing the shots were fired at him, returned fire and killed the victim.<sup>55</sup> The defendant's shooting at the victim was found to be the proximate cause of the murder because the defendant's act provoked the gun battle.<sup>56</sup> In this type of situation the defendant may be the proximate cause of the death, whether or not the victim was killed by the defendant or the third party.<sup>57</sup>

In *Gardner*, the court addressed the provocative act doctrine.<sup>58</sup> Provocative act murder applies to situations similar to *Gardner*, where the defendant did not kill or have the intent to kill; instead, a third party kills the victim in response to the defendant's initial act.<sup>59</sup> According to the provocative act doctrine, the prosecution has the burden to show both that the defendant "committed an 'intentional provocative act' whose 'natural consequences are dangerous to human life,'" and that the killing was "proximately caused by the intentional and dangerous acts perpetrated by a defendant."<sup>60</sup> A discussion of the provocative act doctrine is important because it implies a degree of foreseeability. Standing alone, however, the doctrine is insufficient to prove proximate cause.

The possibility remains that although the defendant initiates the provocative act, the third party's actions are so remote that they are unforeseeable, superceding events that break the causal chain. As long as the intervening acts of a third party, however, are not "disconnected and unforeseeable," they are dependent intervening

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he may grab for it and perhaps cause a discharge in this way . . . ." *Id.* Under the current California Penal Code, the defendant would not be convicted of felony-murder because the felony-murder rule does not apply when a victim causes the death of another victim. See discussion of *infra* Section A.4. A defendant, however, could still be held criminally responsible for the homicide under the theory of proximate cause—the victim's act was a foreseeable intervening act that does not break the causal chain.

54. 37 Cal. App. 4th 473, 475, 43 Cal. Rptr. 2d 603, 605 (1995).

55. *See id.*

56. *See id.* at 482–83, 43 Cal. Rptr. 2d at 609–10.

57. *See id.* at 480, 43 Cal. Rptr. 2d at 608.

58. The court in *Gardner*, found that the provocative act doctrine jury instruction was appropriate because the defendant, by firing at the victim, committed an "intentional provocative act." *Id.*

59. *See* F. LEE BAILEY & HENRY B. ROTHBLATT, CRIMES OF VIOLENCE: HOMICIDE AND ASSAULT § 598.1 (Cum. Supp. 2002).

60. *Gardner*, 37 Cal. App. 4th at 480, 43 Cal. Rptr. 2d at 608.

acts, and the defendant remains the proximate cause of the homicide.<sup>61</sup>

iii. dependent intervening acts of the victim

Negligence of the victim, even if a contributory cause of the victim's death, does not relieve the defendant of any criminal liability from the defendant.<sup>62</sup> Generally, a defendant cannot introduce the victim's negligence to negate the element of causation. In *People v. Morse*, two police officers died while trying to disarm a bomb constructed by the defendant.<sup>63</sup> The defendant wanted to negate the element of causation by showing gross negligence or reckless behavior on the part of the police officers.<sup>64</sup> The court did not allow this evidence because negligence of the victim is not a defense.<sup>65</sup>

Nevertheless, a defendant may introduce a victim's negligent conduct in some circumstances.<sup>66</sup> In order to prove that the victim's negligent conduct was a superseding cause, the victim's conduct must have been "highly extraordinary" under the circumstances."<sup>67</sup>

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61. *Id.* at 483, 43 Cal. Rptr. 2d at 610.

62. See CALJIC 8.56 (the defendant may not argue that the victim's "or some other person's negligence was a contributory cause of the death involved in the case"); see also *People v. Armitage*, 194 Cal. App. 3d 405, 411, 239 Cal. Rptr. 515, 518 (1987) (defendant flipped his boat over and the victim abandoned the boat and died while trying to swim to shore). The court found that, even if victim's decision was reckless, it was a reasonably foreseeable intervening cause and defendant was held criminally liable. See *id.* at 421, 239 Cal. Rptr. at 525.

63. 2 Cal. App. 4th 620, 631, 3 Cal. Rptr. 2d 343, 346 (1992).

64. See *id.* at 637-39, 3 Cal. Rptr. 2d at 350-51.

65. See *id.* at 639, 3 Cal. Rptr. 2d at 351.

66. See *id.* at 668, 3 Cal. Rptr. 2d at 371 (Johnson, J., concurring & dissenting). "Numerous cases from California and other jurisdictions, as well as respected commentators, have recognized the possibility of the victim's intervening negligence affecting causation to such an extent the defendant is relieved of liability." *Id.*

67. *Id.* It will be very difficult to establish that defendant's conduct was a superseding cause. For an example of what may qualify, see *Carbo v. State*, 62 S.E. 140 (Ga. Ct. App. 1908) (defendant's criminal acts resulted in the explosion of the building, victim was warned about the dangers of entering the building, but entered anyway and was killed in a subsequent explosion). In *Carbo*, the defendant's conviction for involuntary manslaughter was reversed. *Id.* at 141. These facts may rise to the level of "highly extraordinary conduct,"

As noted by the dissent in *Morse*, the inability of defendants to present evidence of a victim's negligence effectively takes "the determination of proximate cause away from the jury."<sup>68</sup> In fact, some have argued that it is prejudicial error to preclude evidence of the victim's negligence.<sup>69</sup> Regardless, proximate cause is usually a question decided beyond a reasonable doubt by the trier of fact.

A victim's behavior is also particularly important when the victim is deciding whether or not to receive life-sustaining treatment. A victim's decision to refuse life support is a dependent intervening act that does not break the causal chain between the defendant's wrongful act and the victim's death. According to the California Legislature, a person's choice not to prolong his life through artificial life support is protected as a matter of public policy; the right to control one's own medical care—including life-sustaining procedures—is a fundamental right.<sup>70</sup>

In *People v. Adams*, the victim directed his physician not to place him on life support because he preferred to die rather than be kept alive only by a respirator.<sup>71</sup> The court found that the victim's right to reject life-sustaining treatment is a fundamental constitutional right.<sup>72</sup> California courts view a victim's decision to refuse such treatment as a foreseeable intervening cause that does not break the chain of causation.<sup>73</sup> Thus, the victim's choice not to

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but one cannot be sure because as of yet, California cases have not dealt with gross negligence or recklessness of the victim.

68. 2 Cal. App. 4th at 671, 3 Cal. Rptr. 2d at 372.

69. The dissent in *Morse* makes this important point but it has yet to prove as a useful tool in causation jurisprudence in California. *See id.* at 670, 3 Cal. Rptr. 2d at 372. It may serve, however, as a convincing argument to allow such evidence into trial. *See id.*

70. *See* CAL. PROB. CODE § 4650 (West Supp. 2003). The California Legislature has also set forth procedures that enable an adult to execute written directives for withholding or withdrawal of life-sustaining procedures. *See id.* § 4673 (West Supp. 2003).

71. 216 Cal. App. 3d 1431, 1436, 265 Cal. Rptr. 568, 571 (1990).

72. *See id.* at 1438, 265 Cal. Rptr. at 572.

73. *See generally id.* at 1431, 265 Cal. Rptr. at 568; *People v. Saldana*, 47 Cal. App. 3d 954, 121 Cal. Rptr. 243 (1975) (discussing how the removal of victim from respirator which resulted in the ultimate death was not an unforeseeable intervening cause of death). If the victim's death, however, results from the refusal of necessary medical treatment, the result is not clear. For example, if a Jehovah Witness, because of his religious beliefs, refuses all medical treatment and death ensues, should his actions be seen as dependent

prolong his life through artificial life support is not an independent intervening act.

Similar to a victim's decision to refuse life-sustaining treatment, a victim's decision to commit suicide may constitute a dependent intervening act.<sup>74</sup> If the defendant intentionally inflicted injury on the victim, which resulted in the victim's impulse to commit suicide, the defendant may be held responsible for the death.<sup>75</sup>

This Section has presented various situations where an intervening act is seen as a dependent and foreseeable consequence of the defendant's actions. In those cases, the causal chain is not broken between the defendant's criminal conduct and the victim's death, and thus the defendant may be held criminally liable.

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intervening acts? See *R v. Blaue*, 3 All E.R. 446, 450 (1975) (defendant's conviction was upheld where the victim was stabbed in the lung and because of her religious beliefs refused to have a blood transfusion which resulted in her death). The following rationale supports the court's conclusion that the victim's refusal of medical treatment is *not* a superceding cause: if a victim is unable to receive medical treatment, the defendant is guilty of the homicide. The defendant should be equally guilty if the victim *elects* not to receive medical assistance. See *id.*

74. See *Adams*, 216 Cal. App. 3d at 1440, 265 Cal. Rptr. at 574.

75. See *Tate v. Canonica*, 180 Cal. App. 2d 898, 915, 5 Cal. Rptr. 28, 40 (1960) (defendant's acts allegedly caused victim to become physically and emotionally disturbed, and as a direct result the victim committed suicide). The court found that the victim's suicide could be found as a direct result of the defendant's actions; this foreseeable result would not be an independent intervening act. See *id.* at 915, 5 Cal. Rptr. at 40. The court remanded and gave the prosecution an opportunity to amend its complaint to include a cause of action under the newly proposed rules on suicide. See *id.* at 918-19, 5 Cal. Rptr. at 42. Because this was a case of first impression, however, it is unclear whether the case has had any influence in subsequent rulings. The case presents a unique fact pattern, but may be relevant as the issues of suicide—specifically physician assisted suicide—remain a national focus. See also *Lewis*, 124 Cal. 551, 57 P. 470 (1899) (after defendant shot victim, victim then slit his own throat). Although the *Lewis* court found the defendant guilty because it reasoned that the gun shot was a substantial factor in the victim's death, it also concluded that if the self-inflicted knife wound alone would have been the cause of death, "no doubt the defendant would be responsible, if it was made to appear, and the jury could have found from the evidence, that the knife wound was caused by the wound inflicted by the defendant in the natural course of events." *Id.* at 555, 57 P. at 472.

*b. intervening independent acts/superseding causes*

An independent intervening act is so unforeseeable and disconnected that it supercedes and breaks the causal chain between defendant's wrongful conduct and the resulting death of the victim. Where an independent, intervening act occurs, the defendant's act will not be the proximate cause of the injury.

*i. intervening independent acts by a third party*

Intervening acts by a third party that are unforeseeable may supercede and break the causal chain between the defendant's act and the victim's death.<sup>76</sup> Harm done to the victim after the defendant's wrongful act may be seen as unforeseeable, and may thus absolve the defendant of homicide liability. In *People v. Herbert*, the decedent was struck by the defendant and fell from a bar stool, striking his head on the floor.<sup>77</sup> The victim later fell down in the police station, again striking his head on the floor. The court found that because either of the blows might have caused the death, the second fall could be raised as an intervening cause in defense of a homicide charge. The court reversed the defendant's conviction because the jury was not properly instructed on this matter.<sup>78</sup>

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76. See *People v. Cervantes*, 26 Cal. 4th 860, 872, 29 P.3d 225, 233, 111 Cal. Rptr. 2d 148, 157 (2001) (court found that the provocative act doctrine requires a finding of proximate cause). This case involved a revenge killing by persons who were not responding to defendant's initial provocative act. See *id.* at 874, 29 P.3d at 234-35, 111 Cal. Rptr. 2d at 159. Because the court found the third parties acted with malice aforethought when they fired at the victim instead of the defendant, the third party actions were unforeseeable independent intervening acts that broke the chain of causation between defendant's wrongful act and victim's death. See also BAILEY & ROTHBLATT, *supra* note 59, at § 598.1. In *Cervantes*, the third party acts were themselves "criminal [and] felonious" and "[e]ven if the murder was in direct response to the defendant's act, no one forced the killers' response." *Id.*

77. 228 Cal. App. 2d 514, 515, 39 Cal. Rptr. 539, 540 (1964).

78. See *id.* at 521, 39 Cal. Rptr. at 544.

[T]he fall in the police station could have been found to be an extraordinary and abnormal occurrence, not reasonably foreseeable as a result of the first injuries. The failure of the court to instruct that defendant would have been responsible for the consequences of the injuries received after [the victim] was taken from the barroom only if further injury was reasonably to be anticipated, and the giving of instructions that enabled the jury to hold him responsible for later injuries even if the same were not reasonably foreseeable was

## ii. independent intervening acts by the victim

A victim's conduct may be so unforeseeable that it supercedes and breaks the chain of causation. In *People v. Roberts*, a state prison inmate was attacked and stabbed eleven times by the defendant.<sup>79</sup> In response to the stabbing, the inmate grabbed the knife and pursued one of his assailants up the stairs where he fatally stabbed a prison guard.<sup>80</sup> The court found that the jury could have enough evidence to find the defendant guilty of both deaths, but ruled that the failure to instruct the jury on the issue of foreseeability was prejudicial error.<sup>81</sup> That decision suggests that a fact pattern as obscure as *Roberts* may cause a jury to determine that a victim's act is independent and not a foreseeable consequence of a defendant's conduct.<sup>82</sup>

The dearth of case law on independent intervening acts reveals that courts are much more likely to find proximate cause. Many times, proximate cause is attributed to public policy concerns. As a result, courts do not take a definitive approach to the issue. It is fair to speculate that unless the intervening cause is overwhelmingly remote and unforeseeable, it is unlikely that the intervening cause will overcome a proximate cause challenge.

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prejudicial and reversible error.

*Id.*

79. 2 Cal. 4th 271, 295, 826 P. 2d 274, 284, 6 Cal. Rptr. 2d 276, 286 (1992).

80. *See id.*

81. *See id.* at 321–22, 826 P. 2d at 301–02, 6 Cal. Rptr. 2d at 303–04. Although the court in *Roberts* did not explicitly address the provocative act doctrine, it did emphasize that: “principles of proximate cause may sometimes assign homicide liability when, foreseeable or not, the consequences of a dangerous act directed at a second person cause an impulsive reaction that so naturally leads to a third person’s death that the evil actor is deemed worthy of punishment.” *Id.* at 317, 826 P. 2d at 298, 6 Cal. Rptr. at 300.

82. A victim’s grossly negligent acts that result in his death may be so remote as to constitute a superceding cause. *See People v. Taylor*, 112 Cal. App 3d 348, 362–66, 169 Cal. Rptr. 290, 298–300 (1980) (defendant furnished victim heroin which resulted in the victim’s death, but defendant offered evidence that the victim intentionally caused his own death because he was depressed and wanted to commit suicide) (*overruled by an unpublished case*).



#### 4. Felony-murder and causation

Under the felony-murder doctrine, a defendant may be prosecuted for a homicide committed during the perpetration of a felony.<sup>83</sup> As a result, there is not necessarily a strict causal relationship between the felony and the homicide. Even if the felony-murder doctrine is not applicable,<sup>84</sup> however, the defendant may be found guilty of the homicide under other proximate cause theories such as foreseeable dependent acts by a third party or the victim.<sup>85</sup> In other words, liability may be found independent of the felony-murder doctrine.

In *People v. Harrison*, the victim was shot during the commission of a robbery by his fellow worker, a non-participant to the robbery.<sup>86</sup> The court found that the victim's shooting was the natural result of the defendant's acts; therefore, the attempted robbery was the proximate cause of the death.<sup>87</sup>

83. CAL. PENAL CODE § 189 (West 1999 & Supp. 2003) ("All murder which is . . . committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, [or] train wrecking . . . is murder of the first degree.")

84. See, e.g., *People v. Washington*, 62 Cal. 2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965) (court held that a felony-murder conviction is only proper if the defendant or his accomplice committed the killing while furthering their common design).

85. See discussion *supra* Sections A.3.a.ii., A.3.a.iii. (intervening acts by a third party or the victim are foreseeable and do not break the chain of causation between the defendant's wrongful act and the victim's death).

86. 176 Cal. App. 2d 330, 1 Cal. Rptr. 414 (1959).

87. See *id.* at 345, 1 Cal. Rptr. at 425.

[W]here it reasonably might or should have been foreseen by the accused that the commission of or the attempt to commit the contemplated felony would be likely to create a situation which would expose another to the danger of death at the hands of a non-participant in the felony, the creation of such situation is the proximate cause of the death; and that the killing is murder of the first degree . . . .

*Id.*

Although the situation in *Harrison* may have fallen under the felony-murder doctrine (this case came before *People v. Washington*, which placed restrictions on the doctrine, see discussion *supra* note 84), the court in *Harrison* decided the case outside the scope of the felony-murder doctrine. *But see* *People v. Patterson*, 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989). Defendant supplied cocaine to victim, who died as a result of ingesting the cocaine. See *id.* at 618, 779 P.2d at 552, 262 Cal. Rptr. at 198. The court remanded the case to the trial court to see if this offense was inherently dangerous and opined that if the trial court found the offense not inherently

Although the felony-murder doctrine is virtually comprehensive and many times causation is not at issue, the doctrine has certain limitations.<sup>88</sup> If the homicide falls outside the scope of the felony-murder doctrine, the homicide may be a foreseeable result of the defendant's act and the defendant will be liable for the homicide.<sup>89</sup> Thus, the application of the felony-murder doctrine virtually eliminates the causation element, but the doctrine's limited reach illustrates the importance of the intervening act doctrine within the proximate cause analysis.

As evidenced throughout the discussion, causation plays an important role in California homicide law. Although many times it is not a central issue in the case, it still may have an important impact on the final outcome. The examples and explanations of current causation law in California provide tools to approach any causation issue in a homicide case. Of course, this is only the starting point in the analysis. The discussions of the case law within each area provide a better understanding of the development of causation in California homicide law. If the number of homicides continues to increase in California, the issue of causation may become even more important to homicide case law.<sup>90</sup>

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dangerous, dismissing the murder conviction would be justified. *See id.* at 625, 779 P.2d at 557, 262 Cal. Rptr. at 203. Although the court did not specifically discuss proximate cause, it also appears that the defendant could not be found guilty for the homicide under a proximate cause theory; the victim's act of ingesting the cocaine was not foreseeable and it therefore superseded and broke the causal chain between defendant's act of providing the cocaine and victim's death.

88. *See* discussion of *People v. Washington*, *supra* note 84.

89. *See* discussion of *People v. Harrison*, *supra* note 87. If the intervening act is foreseeable, it is a dependent intervening act, and defendant may be held responsible for the homicide regardless of the impact of the felony-murder doctrine.

90. "The number of homicides reported for the first six months of 2002 increased 16.0 percent compared to the same period in 2001." California Department of Justice, Division of Criminal Justice Information Services, *Crime 2002 In Selected California Jurisdictions January Through June*, available at <http://caag.state.ca.us/cjsc/publications/preliminarys/jj02/jj02.pdf> (last visited Mar. 17, 2003). *See also* United States Department of Justice, Bureau of Justice Statistics, *Characteristics of Homicides in California*, available at <http://149.101.22.40/dataonline/Search/Homicide/State/RunHomStatebyState.cfm> (last revised Jan. 16, 2003). The homicide rate decreased from 3,531 deaths in 1995, to 2,005 deaths in 1999. The 2002

### B. Transferred Intent Doctrine in California Homicide

The doctrine of transferred intent was developed to hold persons accountable for their unlawful conduct.<sup>91</sup> The doctrine is better understood through the following example: X intends to kill Y, but the bullet misses Y and instead kills Z. Even though X's intent was to kill Y not Z, X "caused the death of another and should therefore be treated as if he had killed Y."<sup>92</sup> Courts often use the transferred intent doctrine to avoid allowing persons to escape criminal liability for wrongful, yet unforeseeable, consequences of their actions. A person's intent, rather than the consequences of their behavior, is the deciding factor.<sup>93</sup>

#### 1. Historical perspective

The transferred intent doctrine has been a part of criminal law jurisprudence in the United States for many years. It was first clearly articulated in a sixteenth century English case, *The Queen v. Saunders & Archer*.<sup>94</sup> In *Queen*, the defendant gave his wife a poisoned apple.<sup>95</sup> She then gave the apple to her daughter who ate it and died shortly thereafter.<sup>96</sup> The defendant was found guilty of the murder of his daughter.<sup>97</sup> The court was concerned that someone must be punished for the crime of murder, and it found that the defendant must suffer for the consequences of his actions.<sup>98</sup> The court explained:

[If he] lays the poison with an intent to kill some reasonable creature, and another reasonable creature, whom he does not intend to kill, is poisoned by it, such death shall not be

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statistics, however, indicate that the current trend is an increase in the homicide rate.

91. See PAUL E. DOW, CRIMINAL LAW 79 (1985).

92. See PETER SEAGO, CRIMINAL LAW 71 (1985). Dow provides the following example to further illustrate the transferred intent doctrine: "if a father intends to shoot and kill his hated son but the shot misses and kills his beloved wife, the intent to kill is *transferred* from the son to the wife. A charge of murder would result irrespective of the father's poor marksmanship." DOW, *supra* note 91, at 34.

93. See DOW, *supra* note 91, at 34.

94. 75 Eng. Rep. 706 (K.B. 1907).

95. See *id.* at 707.

96. See *id.*

97. See *id.* at 706.

98. See *id.*

dispunishable, but he who prepared the poison shall be punished for it, because his intent was evil. And therefore it is every man's business to foresee what wrong or mischief may happen . . . and it shall be no excuse for him to say that he intended to kill another, and not the person killed.<sup>99</sup>

The transferred intent doctrine carried over to the United States and became a familiar component of many criminal cases where the defendant's intended harmful act was perpetrated against an unintended person.<sup>100</sup> One of the first formations of the transferred intent doctrine in California criminal law was crafted in *People v. Suesser*. There, the court determined that a defendant who shoots with the intent to kill one person and hits a bystander is subject to the same criminal liability that would have been imposed had "the fatal blow reached the person for whom intended."<sup>101</sup>

The concept of transferred intent is not codified. Instead, it is an imported theory from common law tort. In tort law, transferred intent is invoked when the defendant intends harm but inflicts it on an unintended person.<sup>102</sup> In most situations, the transferred intent doctrine is applied to relatively aberrational fact patterns.<sup>103</sup> The most common scenario is defendant shoots at A, intending to kill A, but defendant's aim is bad and he misses A and kills B, an innocent bystander.<sup>104</sup> The intent to injure A is transferred from A to B—" [t]he intention follows the bullet."<sup>105</sup> The defendant in such a case

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99. *Id.* at 708.

100. See William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 652–53 (1967). Prosser further explains that early criminal cases were preoccupied with moral guilt and the "obvious fact that if the defendant was not convicted there would be no one to punish for the crime." *Id.* at 653.

101. 142 Cal. 354, 366, 75 P. 1093, 1098 (1904). The court held that although the defendant erroneously believed that the deceased was his intended victim i.e., shot and killed the wrong person, it was "immaterial whether the intent was to kill the person killed or whether the death of such person was the accidental or otherwise unintended result of the intent to kill some one [sic] else—the criminality of the act will be deemed the same." *Id.* at 366–67, 75 P. at 1098.

102. See RESTATEMENT (SECOND) OF TORTS § 16(2).

103. Anthony M. Dillof, *Transferred Intent: An Inquiry into the Nature of Criminal Culpability*, 1 BUFF. CRIM. L. REV. 501, 502 (1998).

104. Prosser, *supra* note 100, at 650.

105. *Id.*

would be guilty of murder. Although the defendant's intent transfers to B, the defendant cannot be convicted of a greater crime against the unintended victim than he would have been convicted of had he killed his intended victim. For example, if a person purposely attempts to kill one person but mistakenly kills another, the law transfers the intent, and the homicide committed is murder in the first degree. If the defendant had not premeditated and deliberated about the intended killing, however, he could not have been found guilty of first-degree murder for the unintended killing.

The California Supreme Court explicitly approved the transferred intent doctrine in *People v. Sears*. In that case, the court stated that "if a person purposely and of his deliberate and premeditated malice attempts to kill one person but by mistake and inadvertence kills another instead, the law transfers the intent and the homicide so committed is murder of the first degree."<sup>106</sup> Similar to the first application of the transferred intent doctrine, California courts continue to believe that the transferred intent doctrine prevents persons from escaping their punishment because of a "'lucky' mistake."<sup>107</sup> Further, the concern that defendants should not escape punishment even if their harmful conduct was an "accident" is embodied in California's twenty-first century approach to the transferred intent doctrine.<sup>108</sup>

The transferred intent doctrine and its underlying philosophy on punishment is criticized by both legal scholars and judges.<sup>109</sup> The primary concern is that in cases where the transferred intent rule is

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106. 2 Cal. 3d 180, 189, 465 P.2d 847, 853, 84 Cal. Rptr. 711, 717 (1970).

107. *People v. Bland*, 28 Cal. 4th 313, 321, 48 P.3d 1107, 1112, 121 Cal. Rptr. 2d 546, 552 (2002). This is the most recent California Supreme Court case that discusses the transferred intent doctrine. See further case discussion *infra* subsection 2.

108. See *id.*

109. See *People v. Scott*, 14 Cal. 4th 544, 554–55, 927 P.2d 288, 295, 59 Cal. Rptr. 2d 178, 185 (Mosk, J., concurring) (1996). Justice Stanley Mosk described the transferred intent rule as "peculiarly mischievous" and an "altogether unnecessary legal fiction". *Id.* Other commentators have also criticized the use of the transferred intent doctrine, describing it as a "'bare-faced' legal fiction." *Id.* at 550, 927 P.2d at 292, 59 Cal. Rptr. 2d at 182. Some have gone as far as to declare the doctrine has no place in criminal law because it "has the vice of being a misleading half-truth, often given as an improper reason for a correct result, but incapable of strict application." *Bland*, 28 Cal. 4th at 324 n.2, 48 P.3d at 1114 n.2, 121 Cal. Rptr. 2d at 554 n.2.

applied, defendants are lacking the necessary mens rea for the killing for which they are prosecuted. Courts, including those in California, recognize these criticisms, but continue to apply the transferred intent doctrine.<sup>110</sup> Instead of dismantling the rule, the courts continue to clarify and narrow the doctrine.<sup>111</sup> In its most recent decision, the California Supreme Court placed more limits on the application of the doctrine.<sup>112</sup> It appears that criticisms of the transferred intent doctrine continue to impact how the courts choose to apply the doctrine.<sup>113</sup>

## 2. Current application of the transferred intent doctrine

In *People v. Scott*, the defendants shot and missed their intended victim, but fatally shot an innocent bystander instead.<sup>114</sup> The court found that the transferred intent instruction was properly given.<sup>115</sup> The instruction states: "When one attempts to kill a certain person, but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed, had been killed."<sup>116</sup> The court further found that the defendants could be found guilty of both attempted murder of their unintended victim, and second-degree murder of the innocent bystander.<sup>117</sup> The court, however, left unanswered the question of what type of criminal liability is appropriate when both the unintended and intended victims are killed.

The California Supreme Court recently clarified the application of the transferred intent doctrine to a homicide where the defendant

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110. See, e.g., *Scott*, 14 Cal. 4th 544, 927 P.2d 288, 59 Cal. Rptr. 178.

111. See *Bland*, 28 Cal. 4th at 326, 48 P.3d at 1116, 121 Cal. Rptr. 2d at 556 (the transferred intent doctrine extends to everyone who is actually killed but does not apply to attempted murder).

112. *Id.* at 326–31, 48 P.3d at 1116–19, 121 Cal. Rptr. 2d at 556–61 (court narrowed the transferred intent doctrine and chose not to apply it to crimes of attempt). See further discussion of current case law, *infra* subsection 2.

113. Some of the critics' concerns could have played a role in the California Supreme Court's decision in *Bland* not to apply the transferred intent doctrine to crimes of attempt.

114. 14 Cal. 4th 544, 546, 927 P.2d 288, 289, 59 Cal. Rptr. 2d 178, 179 (1996).

115. See *id.* at 546–47, 927 P.2d at 289, 59 Cal. Rptr. 2d at 179.

116. CALJIC 8.65 (6th ed. 1996).

117. *Scott*, 14 Cal. 4th at 553, 927 P. 2d at 293–94, 59 Cal. Rptr. 2d at 183–84.

kills both the intended and unintended victims. Previously, in *People v. Birreuta*, the court held that when the intended victim is killed it is unnecessary to rely on the transferred intent doctrine.<sup>118</sup> In *Birreuta*, the court found that because both the intended victim and the unintended victim were killed, the defendant was guilty of one count of first-degree murder for the intended victim, and one count of second-degree murder or manslaughter for the unintended victim.<sup>119</sup> The court reasoned that a person who intends to kill two people and does so is more culpable than a person who intends to kill one person and accidentally kills two. Therefore, the court held that the latter should be subjected to a lesser punishment.<sup>120</sup>

This reasoning was not contested by the California Supreme Court until recently in *People v. Bland*.<sup>121</sup> In *Bland*, the court strongly disagreed with the idea that if the intended victim is killed, the same intent cannot be transferred to the unintended victims.<sup>122</sup> Instead, it found that the intent is not “‘used up’ once it is employed to convict a defendant of a specific intent crime against the intended victim.”<sup>123</sup> Therefore, a person’s intent to kill the intended target can be used to convict the defendant of murdering the target. In addition, the intent to kill can be used to convict the defendant of all unintended murders. The court’s reasoning can be explained either as the intent to kill the intended target transfers to others also killed, or the intent to kill need not be directed at a specific person.<sup>124</sup>

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118. See *People v. Birreuta*, 162 Cal. App. 3d 454, 460, 208 Cal. Rptr. 635, 639 (1984)(*overruled by* *People v. Bland*, 28 Cal. 4th 313, 326, 48 P. 3d 1107, 1115, 121 Cal. Rptr. 2d 546, 556 (2002)). Although *Bland* overruled *Birreuta*, the latter case is included in this analysis to further articulate the evolution of the transferred intent doctrine in California case law.

119. See *Birreuta*, 162 Cal. App. 3d at 460, 208 Cal. Rptr. at 639.

120. See *id.*

121. 28 Cal. 4th 313, 48 P. 3d 1107, 121 Cal. Rptr. 2d 546 (2002). It is important to note that in *People v. Carlson*, the court found that “there can be no doubt that the doctrine of ‘transferred intent’ applies even though the original object of the assault is killed as well as the person whose death was the accidental or the unintended result of the intent to kill the former.” 357 Cal. App. 3d at 357, 112 Cal. Rptr. at 326. In *Bland*, the court’s reasoning is dicta because the intended victim was not killed in this case. 28 Cal. 4th 313, 48 P.3d 1107, 121 Cal. Rptr. 2d 546.

122. See *Bland*, 28 Cal. 4th at 326, 48 P.3d at 1115, 121 Cal. Rptr. at 556.

123. *Id.* at 322, 48 P.3d at 1113, 121 Cal. Rptr. at 553 (quoting *People v. Scott*, 14 Cal. 4th 544, 927 P.2d 288, 59 Cal. Rptr. 178 (1996)).

124. See *id.*

In *Bland*, the court argued that this new expansion of the transferred intent doctrine further served the purpose of deterrence. The main reasoning articulated the definition of mens rea:

“By thinking of the *mens rea* in such finite terms—as some discrete unit that must be either here or there—we have created a linguistic problem for ourselves when no real-life problem existed . . . . Unforeseen circumstances may multiply the criminal acts for which the criminal agent is responsible. A single state of mind, however, will control the fact of guilt and the level of guilt of them all.”<sup>125</sup>

After *Bland*, it is clear that the defendant's guilt is unaffected by the intended victim's fate. This holding was a departure from the *Birreuta* decision, and resulted in the court's disapproval of that decision to the extent that it was inconsistent with the *Bland* opinion.<sup>126</sup>

In addition to expanding the transferred intent doctrine to include convictions in situations where both the intended victim and the unintended victim are killed, *Bland* also placed some restrictions on the transferred intent doctrine. According to the court in *Bland*, the transferred intent doctrine does not apply to the crime of attempted murder. If the intended victim is killed, the defendant cannot be charged with attempted murder of the unintended victim.<sup>127</sup> If only the unintended victim is killed, however, the defendant can be charged with both murder of the unintended victim, and attempted murder of the intended victim.

As evidenced in even the most recent court decisions, the transferred intent doctrine remains an important part of the development of homicide law in California. Because of the dearth of case law in this area, it is difficult to speculate how—or even if—the transferred intent doctrine will further develop. After *Bland*, the transferred intent doctrine is restricted in certain crimes of attempted murder, but it is frequently implemented in many other situations. Because the doctrine is substantially criticized, however, the courts may chose to place additional restrictions on it.

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125. *Bland*, 28 Cal. 4th at 325, 48 P.3d at 1115, 121 Cal. Rptr. at 556 (quoting *Harvey v. State*, 681 A.2d 628 (1996)).

126. *Bland*, 28 Cal. 4th at 326, 48 P.3d at 1115, 121 Cal. Rptr. at 556.

127. *Id.* at 331, 48 P. 3d at 1119, 121 Cal. Rptr. at 560.



Ultimately, although it is possible to conclude from the changing application of the transferred intent doctrine that California courts are willing to further refine the doctrine, one should plan to keep it as an essential part of homicide law.

## VI. THE FELONY-MURDER DOCTRINE\*

## A. Introduction

California Penal Code section 187 defines murder as “the unlawful killing of a human being, or a fetus, with malice aforethought.”<sup>1</sup> The phrase “malice aforethought” is a term of art, which connotes a number of different *mentes rea*e that render a homicide particularly heinous, thus constituting murder.<sup>2</sup>

California law divides murder into two degrees, each distinguished by a different *mens rea*.<sup>3</sup> A killing committed with the purpose and specific intent to kill based on willfulness, deliberation, and premeditation constitutes first-degree murder.<sup>4</sup> Second-degree

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1. CAL. PENAL CODE § 187 (West 1998 & Supp. 2003).

2. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW & ITS PROCESSES CASES & MATERIALS* 386 (6th ed. 1995) (citing to Report of the Royal Commission on Capital Punishment, 1945–1953, 25–28 (1953)); California Penal Code § 188 defines “malice” in both express and implied forms. See CAL. PENAL CODE § 188. Malice is express when there is a manifestation of “deliberate intention unlawfully to take away the life of a fellow creature . . .” *Id.* Malice is implied when “no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.” *Id.*

3. See DOUGLAS DALTON & PATRICIA KNIGHTEN, *CALIFORNIA CRIMINAL LAW* § 5.5[A] (2002) (stating first-degree murder is divisible into three different categories: (1) deliberate and premeditated murder, (2) statutory first-degree murder, and (3) first-degree felony murder); See also *id.* § 5.6[A]. (stating second-degree murder may be proved based on one of three theories, including: (1) unpremeditated murder with express malice, (2) implied malice murder, and (3) second-degree felony-murder).

4. See *id.* § 5.5[B] (“Deliberation” refers to careful weighing of considerations in forming a course of action, and “premeditation” means thought over in advance); see also *id.* § 5.5[C] (stating [Cal. Penal Code] § 189 also enumerates certain acts to be conclusive evidence of premeditation as a matter of law, including killing by means of a destructive device or explosive, armor-piercing ammunition, poison, torture, lying in wait, or drive-by shooting).

murder, on the other hand, does not have the requirement of a specific intent to kill. Proof of purpose to kill without premeditation, or implied malice based on proof of recklessness constitutes second-degree murder.<sup>5</sup> Although a sufficiently culpable mens rea is the distinguishing criterion in most homicide cases, there is controversy surrounding its definition because some killings are heinous, yet do not fall into either one of these categories.<sup>6</sup>

The felony-murder doctrine is an alternative theory of murder that does not involve the aforementioned mens rea requirements.<sup>7</sup> The rule is triggered when a killing is committed in perpetration of certain felonies, and it “operates to posit the existence of that crucial mental state [for murder].”<sup>8</sup> Specifically, the felony-murder doctrine replaces the first-degree murder requirement of purpose to kill and premeditation.<sup>9</sup> For second-degree murder, it replaces the requirement of express purpose to kill without premeditation or provocation, or the proof of recklessness under the implied malice murder doctrine.<sup>10</sup> Moreover, the felony-murder doctrine renders irrelevant whether the killing was intentional or accidental.<sup>11</sup>

California Penal Code section 189 codifies the first-degree felony-murder doctrine.<sup>12</sup> The statute explicitly proscribes the

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5. See *id.* § 5.6[A].

6. See KADISH & SCHULHOFER, *supra* note 2, at 396. It is plausible that other jurisdictions did not adopt the term “malice” into their homicide statutes because of potential problems with such an amorphous and limited definition. See 18 PA. CONS. STAT. §§ 2501–05 (1998 & Supp. 2002); see also N.Y. PENAL LAW §§ 125–125.25 (McKinney 1998 & Supp. 2003).

7. See 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW ELEMENTS §§ 134, 174 (3d ed. 2000) [hereinafter WITKIN CAL. CRIM. LAW ELEMENTS].

8. *People v. Satchell*, 6 Cal. 3d 28, 43, 489 P.2d 1361, 1372, 98 Cal. Rptr. 33, 44 (1971) (overruled on other grounds by *People v. Flood*, 18 Cal. 4th 470, 490 n.12, 957 P.2d 869, 882 n.12, 76 Cal. Rptr. 2d 180, 193 n.12 (1998)).

9. See CAL. PENAL CODE § 189; DALTON & KNIGHTEN, *supra* note 3, § 5.5[A]–[B].

10. See *People v. Hansen*, 9 Cal. 4th 300, 308, 885 P.2d 1022, 1025, 36 Cal. Rptr. 2d 609, 613 (1994); DALTON & KNIGHTEN, *supra* note 3, § 5.6[A]–[B]; see also CALIFORNIA JURY INSTRUCTIONS No. 8.30 (6th ed. 1996) (jury instructions on unpremeditated murder with express malice) [hereinafter CALJIC]; see also *id.* No. 8.31 (jury instructions on implied malice murder).

11. See *People v. Coefield*, 37 Cal. 2d 865, 868, 236 P.2d 570, 572 (1951); WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 135.

12. CAL. PENAL CODE § 189; see also *People v. Dillon*, 34 Cal. 3d 441, 465, 668 P.2d 697, 710, 194 Cal. Rptr. 390, 403 (1983).

felonies that are subject to this rule.<sup>13</sup> Under the felony-murder doctrine, a killing, whether intentional or unintentional, is murder if committed in the perpetration of certain felonies.<sup>14</sup>

While governed by similar principles as the first-degree felony-murder rule, the second-degree felony-murder doctrine has a much more restrictive application because it is a common law rule that reflects the court's disfavor of the rule.<sup>15</sup> As a result, the second-degree felony-murder doctrine only applies to felonies that are "inherently dangerous to human life."<sup>16</sup> A felony is deemed to be "inherently dangerous to human life" when, viewed in the abstract and not to the particular circumstances of a case, there is "a high probability that it will result in death."<sup>17</sup>

The California Supreme Court has further sought to limit the felony-murder doctrine's application to second-degree murder by adopting the "merger" rule.<sup>18</sup> Under this rule, the felony-murder doctrine is inapplicable to cases where assault is the underlying

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13. Those felonies include "arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, [torture, sodomy, lewd or lascivious acts, oral copulation, or forcible acts of sexual penetration] . . . ." CAL. PENAL CODE § 189.

14. See WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, §§ 134, 174. For a discussion on what constitutes a "perpetration of felony," see *supra* Part VI.B.1.c (underlying felony and the killing as part of one continuous transaction).

15. See *Dillon*, 34 Cal. 3d at 462, 472 n.19, 668 P.2d at 708, 716 n.19, 194 Cal. Rptr. at 401, 408 n.19 (characterizing the felony-murder doctrine as "an almost universally disfavored rule" and that "the second degree felony-murder rule remains, as it has been since 1872, a judge-made doctrine without any express basis in the Penal Code"); DALTON & KNIGHTEN, *supra* note 3, § 5:6[C].

16. See *Hansen*, 9 Cal. 4th at 308, 885 P.2d at 1025, 36 Cal. Rptr. 2d at 612.

17. See *id.* at 309, 885 P.2d at 1026, 36 Cal. Rptr. 2d at 613; *People v. Williams*, 63 Cal. 2d 452, 458, 406 P.2d 647, 650, 47 Cal. Rptr. 7, 10 (1965). When determining whether a felony is "inherently dangerous to human life," the felony should be viewed in the abstract, rather than according to the particular circumstances in which the felony was committed.

18. See *People v. Ireland*, 70 Cal. 2d 522, 539-40, 450 P.2d 580, 590-91, 75 Cal. Rptr. 188, 198-99 (1969); see also *People v. Wilson*, 1 Cal. 3d 431, 462 P.2d 22, 82 Cal. Rptr. 494 (1969) (extending the merger doctrine to first-degree felony-murder, where the underlying felony was based on burglary with the intent to assault with a deadly weapon).

felony.<sup>19</sup> The rationale for such a rule is to ensure that prosecutors prove the necessary mens rea for murder.<sup>20</sup> The second-degree felony-murder doctrine is thus limited to non-assault felonies that are inherently dangerous to human life.<sup>21</sup>

### 1. The purpose of the felony-murder doctrine

Under the felony-murder doctrine, a killing, whether intentional or unintentional, is murder if committed in the perpetration of certain felonies.<sup>22</sup> Although the common law felony-murder rule had a seemingly limitless application,<sup>23</sup> courts today apply it solely to "deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit."<sup>24</sup>

In *People v. Washington*, the defendant and an accomplice were robbing a gasoline station when an employee fired a revolver at the accomplice, mortally wounding him.<sup>25</sup> The trial court convicted the defendant for the murder of his accomplice under the felony-murder doctrine.<sup>26</sup> On appeal, the California Supreme Court rejected the defendant's argument that the purpose of the felony-murder doctrine was to prevent the underlying felonies.<sup>27</sup> Instead, the court stated that the purpose of the felony-murder doctrine was to "deter felons from killing negligently or accidentally by holding them strictly liable for killings they commit."<sup>28</sup> The court held that the felony-murder doctrine did not apply because the killing was not committed

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19. See *Hansen*, 9 Cal. 4th at 312-16, 885 P.2d at 1028-31, 36 Cal. Rptr. 2d at 615-18.

20. See *Ireland*, 70 Cal. 2d at 539, 450 P.2d at 590, 75 Cal. Rptr. at 198.

21. See *Hansen*, 9 Cal. 4th at 312-16, 885 P.2d at 1028-31, 36 Cal. Rptr. 2d at 615-18.

22. See WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, §§ 134, 174. For a discussion on what constitutes a "perpetration of felony," see discussion *supra* Part VI.B.1.c (underlying felony and the killing part of one continuous transaction).

23. In common law, the potentially limitless application of the felony-murder doctrine was never challenged because practically all felonies were punishable by death. See *People v. Aaron*, 299 N.W. 2d 304 (1980).

24. *People v. Washington*, 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965).

25. See *id.* at 779, 402 P.2d at 132, 44 Cal. Rptr. at 444.

26. See *id.*

27. See *id.* at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.

28. See *id.*

by the defendant or by his accomplice but rather by their victim.<sup>29</sup> The court reasoned that punishing the defendant for a killing committed by the victim would undermine the purpose of the felony-murder doctrine.<sup>30</sup>

Today, the felony-murder doctrine applies only to deter negligent or accidental killings.<sup>31</sup> This limited application reflects the court's disfavor towards the potentially harsh consequences of the doctrine, especially under the common law.<sup>32</sup> As the court demonstrated in *Washington*, defendants are only liable for the killings they commit and not for those committed by their victims or by the police.<sup>33</sup>

## 2. Application of the felony-murder doctrine

The felony-murder doctrine applies to both first-degree and second-degree murders.<sup>34</sup> Although the rule achieves the same results under both types of murders, the basis from which these applications result is distinct.

California Penal Code section 189 codifies the first-degree felony-murder doctrine, which is triggered when a killing occurs during the commission of one of the felonies enumerated in the statute.<sup>35</sup> Prosecutors are free to invoke the rule so long as the perpetrator showed an independent purpose for the commission of the proscribed felony.<sup>36</sup>

The second-degree felony-murder rule, on the other hand, has a more limited application. Unlike its first-degree counterpart, the second-degree felony-murder doctrine is a common law doctrine. Courts disfavor the rule and generally restrict its potentially broad application solely to non-assault felonies that are "inherently dangerous to human life."<sup>37</sup>

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29. *See id.*

30. *See id.*

31. *See id.*

32. *See Dillon*, 34 Cal. 3d at 462–63, 472, 668 P.2d at 708–09, 716, 194 Cal. Rptr. at 401–02, 408.

33. *See Washington*, 62 Cal. 2d at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.

34. *See id.*

35. *See* CAL. PENAL CODE § 189 (West 1998 & Supp. 2003).

36. *See id.*

37. *Hansen*, 9 Cal. 4th at 304, 885 P.2d at 1023, 36 Cal. Rptr. 2d at 610.

A comparative analysis of the first-degree and second-degree felony-murder rules reveals a glimpse of the tension between the will of the court and the people of California. Despite the California Supreme Court's distaste towards the rule, the felony-murder doctrine has enjoyed wide-spread public support because it seemingly produces morally justifiable results.<sup>38</sup>

### *B. First-Degree Felony-Murder Doctrine*

California Penal Code section 189 states that a willful, deliberate, or premeditated killing is a first-degree murder.<sup>39</sup> However, a first-degree conviction is still possible without proving a purpose to kill, if the killing took place during the commission of one of the enumerated felonies in section 189.

The first-degree felony-murder doctrine has been the law in California since 1872.<sup>40</sup> Despite its long history in California criminal jurisprudence, it has generally remained unchallenged except for the special circumstance issue under California Penal Code section 190.2.<sup>41</sup>

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38. See SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 108 (1998).

39. See CAL. PENAL CODE § 189.

40. See *id.* When the California legislature enacted its first criminal law statute in 1850, it codified the felony-murder rule as a proviso to its section on involuntary manslaughter, and elevated a killing "in the commission of an unlawful act, [that was] committed in the prosecution of felonious intent, [to] murder." Stats. 1850, ch. 99, p. 231, § 21, *amended by* Stats. 1856, c. 139, p. 219, § 2. At that time, there was only one degree of murder and was punishable by death. *Id.* By 1856, when the legislature divided the murder statute into two degrees, the felony-murder doctrine appeared as a proviso to the involuntary manslaughter statute. See Stats. 1856, ch. 139, p. 219, § 2. Any killing that occurred during perpetration of a felony was elevated to murder. See *id.* Then, § 2 was analyzed to determine the degree of murder. However, when California adopted the Penal Code in 1982, it dropped the proviso from its manslaughter statute but retained the degree-fixing language of § 2, which reappeared as first-degree murder under California Penal Code § 189. although it is arguable that the felony-murder doctrine ceased to exist in 1872 as a statutory doctrine, the present legislative intent reflected the belief that § 189 is a codification of the first-degree felony-murder rule. See *Dillon*, 34 Cal. 3d at 458, 668 P.2d at 706, 194 Cal. Rptr. at 399.

41. A defendant, who is convicted of first-degree felony-murder may be punished by death or life imprisonment in state prison without the possibility of parole if the predicate felony falls under one of the special circumstances listed in Cal. Penal Code § 190.2. See, e.g., *People v. Gutierrez*, 28 Cal. 4th

### 1. Elements of the first-degree felony-murder doctrine

First-degree felony-murder is an alternative theory to willful, deliberate, or premeditated murder. A killing, if committed during the perpetration of certain felonies, can qualify as first-degree murder.<sup>42</sup> This qualification is irrespective of whether the killing was intentional or unintentional.<sup>43</sup> These felonies include “arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking,” torture, sodomy, lewd or lascivious acts, oral copulation, or forcible acts of sexual penetration.<sup>44</sup>

#### *a. specific intent to commit felony enumerated under California Penal Code section 189*

The first-degree felony-murder rule eliminates the showing of purpose to kill or premeditation—ordinary elements of first-degree murder.<sup>45</sup> The felony-murder rule holds a defendant strictly liable for a killing caused by the defendant during the commission of a section 189 felony, regardless of whether the killing was intentional or accidental.<sup>46</sup> The only criminal intent required under this rule is the specific intent to commit the predicate or underlying felony.<sup>47</sup>

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1083, 52 P.3d 572, 124 Cal. Rptr. 2d 373 (2002) (explaining the validity of § 190.2 in general); *People v. Michaels*, 28 Cal. 4th 486, 49 P.3d 1032, 122 Cal. Rptr. 2d 285 (2002) (illustrating the validity under an equal protection challenge); *Pulley v. Harris*, 465 U.S. 37 (1984) (discussing the validity under a cruel and unusual punishment challenge). See generally WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 450 (explaining the felonies for which special circumstances may apply).

42. See CAL. PENAL CODE § 189 (West 1998 & Supp. 2003); WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 134.

43. See WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 134

44. CAL. PENAL CODE § 189 (“All murder . . . which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 286, 288, 288a, or 289 . . . is murder of the first degree.”) (West 2002); see also CAL. PENAL CODE § 206 (torture); CAL. PENAL CODE § 286 (sodomy); CAL. PENAL CODE § 288 (lewd or lascivious acts); CAL. PENAL CODE § 288(a) (oral copulation); CAL. PENAL CODE § 289 (forcible acts of sexual penetrations); CALJIC, *supra* note 10, No. 8.21. See generally WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 134 (explaining which felonies are predicate offenses for first-degree felony-murder).

45. See *Dillon*, 34 Cal. 3d at 475, 668 P.2d at 717–18, 194 Cal. Rptr. at 410.

46. See WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 134.

47. See *id.*



*People v. Coefield* presents a good illustration of an application of the felony-murder rule to an accidental killing.<sup>48</sup> There, one of the defendant's robbery accomplices was trying to beat the victim with a gun when he accidentally shot and killed the attendant of a liquor store.<sup>49</sup> The California Supreme Court upheld the first-degree felony-murder conviction because "the only criminal intent which the prosecution had to show was a specific intent to rob . . . it was not required to prove a deliberate or premeditated killing or to prove any intent to kill."<sup>50</sup>

In *People v. Cantrell*, the court ruled that the intent to kill was irrelevant in the determination of first-degree murder under the felony-murder doctrine.<sup>51</sup> There, the defendant was engaged in lewd sexual acts with a twelve-year-old boy.<sup>52</sup> When the boy began screaming, the defendant reacted by choking the boy to death.<sup>53</sup> The trial court convicted him of engaging in both lewd and lascivious acts under California Penal Code section 288, and first-degree felony-murder.<sup>54</sup> The defendant appealed the murder conviction, contesting that he lacked the mental capacity to deliberately or intentionally strangle the victim.<sup>55</sup> Three psychiatrists testified that the defendant reacted compulsively to the boy's yelling and struggling, and that the defendant had no power to control himself due to his mental condition.<sup>56</sup> The California Supreme Court stated that evidence of defendant's capacity to kill would only be relevant if it was necessary to establish his ability to premeditate and to harbor a purpose to kill.<sup>57</sup> By upholding the first-degree felony-murder

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48. See 37 Cal. 2d 865, 236 P.2d 570.

49. See *id.* at 867, 236 P.2d at 571.

50. *Id.* at 869, 236 P.2d at 573.

51. 8 Cal. 3d 672, 504 P.2d 1256, 105 Cal. Rptr. 792 (1973).

52. See *id.* at 679, 504 P.2d at 1260, 105 Cal. Rptr. at 796.

53. See *id.*

54. See *id.* at 688, 504 P.2d at 1266-67, 105 Cal. Rptr. at 802-03.

55. See *id.* at 677, 504 P.2d at 1258, 105 Cal. Rptr. at 794. Subsequent to *Cantrell*, the California Legislature barred the diminished capacity defense and any evidence of mental disease, mental defect, or mental disorder for the purpose of negating intent to kill or premeditation by enacting § 28 of the Penal Code. See CAL. PENAL CODE § 28(a)-(b).

56. See *id.* at 679, 504 P.2d at 1260, 105 Cal. Rptr. at 796.

57. See *id.* at 688, 504 P.2d at 1266, 105 Cal. Rptr. at 802.

conviction, the court reinforced the concept of only requiring criminal intent to commit the particular felony.<sup>58</sup>

Circumstantial evidence can establish the specific intent to commit the underlying felony.<sup>59</sup> In *People v. Moore*, the California Supreme Court held that although there was no actual testimony of rape, circumstantial evidence supported such a finding. The evidence showed the defendant's obvious desire and purpose to have sexual intercourse with the victim, her refusal to go with the defendant for that purpose, her nude body found with contusions around the sex organs, and the fact that her clothing had been torn off.<sup>60</sup>

Similarly, in *People v. Memro*, the California Supreme Court sustained a first-degree felony-murder conviction based on a violation of California Penal Code section 288.<sup>61</sup> There, the defendant admitted to killing a seven-year-old boy because the boy attempted to leave when the defendant disrobed him and began taking pictures of him.<sup>62</sup> The defendant did not attempt to have sex with the boy until after the boy was dead.<sup>63</sup> However, evidence of the defendant's sexual interest in youths, including a confession in which he described wanting to photograph and have sex with the boy, was sufficient for "a rational jury [to] . . . infer that he planned to act on his sexual interest in young boys by performing a lewd or lascivious act with [the victim]."<sup>64</sup>

In contrast, the California Supreme Court rejected a first-degree felony-murder conviction in *People v. Craig*.<sup>65</sup> There, evidence of

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58. See *id.*; see also *People v. Hernandez*, 47 Cal. 3d 315, 346, 763 P.2d 1289, 1307, 253 Cal. Rptr. 199, 216 (1988) (the California Supreme Court stated that it has "required as part of the felony-murder doctrine that the jury find the perpetrator had the specific intent to commit one of the enumerated felonies, even where that felony is a crime such as rape.").

59. See WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 157.

60. 48 Cal. 2d 541, 544-47, 310 P.2d 969, 971-73 (1957).

61. 11 Cal. 4th 786, 861-62, 905 P.2d 1305, 1346, 47 Cal. Rptr. 2d 219, 260 (1995).

62. See *id.*

63. See *id.* For an explanation as to the significance of defendant's argument that the sexual act took place after the killing, see discussion *supra* Part VI.B.1.c (underlying felony and the killing as part of one continuous transaction).

64. *Memro*, 11 Cal. 4th at 862, 905 P.2d at 1346, 47 Cal. Rptr. 2d at 260.

65. 49 Cal. 2d 313, 316 P.2d 947 (1957).

the victim's torn clothes, slightly spread legs, multiple contusions, and lacerations on the abdominal area were not enough to demonstrate that the killing was committed in the attempt to commit rape or during the commission of rape.<sup>66</sup> Instead, the court based its decision on the fact that there was no evidence on the clothing or body of a sexual act, no blood on the defendant's trousers, and medical testimony revealed that the victim died from strangulation around the neck.<sup>67</sup>

These cases demonstrate that the first-degree felony-murder doctrine applies as an alternative theory to first-degree premeditated murder, regardless of whether the killing was accidental, as in *Coefield*, or whether the prosecution fell just short of proving intent, as in *Cantrell*.<sup>68</sup> As the statutory language of section 189 indicates, a killing is first-degree murder if the underlying offense is one of the enumerated felonies.<sup>69</sup> Thus, the only relevant intent in a first-degree felony-murder analysis is whether the specific intent to commit the predicate felony existed. The prosecution can establish such specific intent by circumstantial evidence.

*b. must prove elements of the underlying felony  
beyond a reasonable doubt*

In order to raise the first-degree felony-murder theory, the defendant must have committed one of the enumerated felonies under section 189. As in any felony, the jury must find all the elements of that independent felony proven beyond a reasonable doubt.<sup>70</sup>

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66. See *id.* at 319, 316 P.2d at 951.

67. See *id.* at 316, 318-19, 316 P.2d at 949, 950.

68. See, e.g., *People v. Morlock*, 46 Cal. 2d 141, 292 P.2d 897 (1956) (defendant's killing of A when he intended to kill P was irrelevant because the killing took place during the perpetration of a robbery); *People v. Johnson*, 38 Cal. App. 3d 1, 112 Cal. Rptr. 834 (1974) (defendant's contention that he did not personally fire the shot which killed the victim was irrelevant because he personally used the revolver in the commission of aiding and abetting a crime).

69. See CAL. PENAL CODE § 189 (West 1998 & Supp. 2003).

70. See *Coefield*, 37 Cal. 2d at 870, 236 P.2d at 573; *People v. Hart*, 20 Cal. 4th 546, 609, 976 P.2d 683, 721, 85 Cal. Rptr. 2d 132, 170 (1999); *People v. Ainsworth*, 45 Cal. 3d 984, 1016, 755 P.2d 1017, 1037, 248 Cal. Rptr. 568, 587 (1988); *People v. Whitehorn*, 60 Cal. 2d 256, 264, 383 P.2d 783, 788, 32 Cal. Rptr. 199, 203 (1963).

In *People v. Granados*, the defendant was prosecuted for the murder of his wife's young daughter, who was struck in the head with a machete and died from resulting injuries.<sup>71</sup> The victim was discovered partially nude, suggesting that she may have been molested.<sup>72</sup> However, there was no evidence of contusion, laceration, or seminal fluid on the victim's private parts.<sup>73</sup> At trial, the prosecution did not pursue a first-degree felony-murder conviction because it could not prove the mens rea requirement for murder.<sup>74</sup> Instead, it sought a first-degree murder conviction based on the theory that the defendant had killed the victim while committing a lewd or lascivious act.<sup>75</sup>

The California Supreme Court instructed that in order to sustain a first-degree felony-murder conviction, the jury must first determine that the defendant committed the underlying felony beyond a reasonable doubt.<sup>76</sup> There, the trial court committed prejudicial error by not instructing the jury that they must first determine that the underlying felony was committed beyond a reasonable doubt before they could find the defendant guilty based on the felony-murder doctrine.<sup>77</sup> As a result, the court modified the defendant's first-degree murder conviction to a second-degree murder conviction.<sup>78</sup>

In order to invoke the first-degree felony-murder doctrine, the prosecution must demonstrate that the defendant was, in fact, engaged in one of the enumerated felonies. Thus, the prosecution must first prove the occurrence of an enumerated felony beyond a reasonable doubt before showing that the killing and the felony were part of one continuous transaction.

*c. underlying felony and the killing part  
of one continuous transaction*

The first-degree felony-murder rule does not require a strict causal relationship between the underlying felony and the

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71. 49 Cal. 2d 490, 492–93, 319 P.2d 346, 348–49 (1957).

72. *See id.* at 497, 319 P.2d at 351.

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.* at 495–96, 319 P.2d at 350.

77. *See id.*

78. *See id.* at 497–98, 319 P.2d at 351.

homicide.<sup>79</sup> However, the mere existence of a felony and a killing in a particular set of facts does not automatically trigger the felony-murder doctrine because the killing must occur during perpetration of that felony.<sup>80</sup> The homicide is committed in the perpetration of the felony if the killing and the felony are parts of one continuous transaction.<sup>81</sup>

In *People v. Hudson*, the defendant and the victim were heading back to town together after spending the night drinking. During the trip, the defendant assaulted the victim, killing him.<sup>82</sup> The defendant then took the victim's wallet and drove away.<sup>83</sup> At trial, there was a factual issue as to whether the defendant had formed his intent to rob before or after he attacked and killed the victim.<sup>84</sup> The trial court refused to instruct the jury that the felony-murder doctrine applied only if the defendant formed his intent to rob before or during the killing.<sup>85</sup> The California Supreme Court reversed the conviction holding that the trial court erred in its refusal because the evidence did not show beyond a reasonable doubt that the defendant had formed the intent to rob before or during the attack.<sup>86</sup>

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79. See *Whitehorn*, 60 Cal. 2d at 264, 383 P.2d at 788, 32 Cal. Rptr. at 204.

80. See *id.*

81. See *id.*; *Hart*, 20 Cal. 4th at 609, 976 P.2d at 721, 85 Cal. Rptr. 2d at 170 (defendant was convicted of first-degree murder for engaging in crimes of rape, sodomy, and oral copulation); *Ainsworth*, 45 Cal. 3d at 1016, 755 P.2d at 1037 (defendant was convicted of first-degree murder for robbery and kidnapping); *Whitehorn*, 60 Cal. 2d at 264, 383 P.2d at 787, 32 Cal. Rptr. at 203 (defendant was convicted of first-degree murder for rape and murder).

82. 45 Cal. 2d 121, 122, 287 P.2d 497, 497 (1955).

83. See *id.*

84. See *id.* at 126-27, 287 P.2d at 500-01. Here, the issue as to whether the defendant formed his intent to rob the victim before or after the killing was close. See *id.* There was no indication that the defendant prepared the robbery before he killed the victim. See *id.* at 126, 287 P.2d at 500. Still, the prosecution had a valid argument when it contested that the defendant's intent rose after he knocked the victim down, but before he dealt the fatal blow. See *id.*

85. See *id.* at 125, 287 P.2d at 499-500. Specifically, the defendant offered the instruction, "If you find that [defendant] . . . had not formed an intention to rob [victim] until after he struck [victim], dragged his body into the ditch then you are instructed that [victim] was not killed by [defendant] in the perpetration of or attempt to perpetrate the crime of robbery." *Id.*

86. See *id.* at 127, 287 P.2d at 500-01.

In *People v. Anderson*, the court further refined the requisite nexus between the predicate felony and the killing.<sup>87</sup> The case involved the killing of a ten-year-old girl, whose entire body contained more than sixty cuts and wounds.<sup>88</sup> Several of the wounds, including a laceration extending from the rectum through the vagina were post-mortem.<sup>89</sup> Evidence revealed that the defendant had torn off the victim's clothes, but there was no trace of seminal fluid.<sup>90</sup> At trial, the prosecution contended that the defendant committed murder in the perpetration or attempt to perpetrate lewd or lascivious acts under California Penal Code section 288. The California Supreme Court clarified its earlier statement in *Hudson*, stating:

[T]he evidence must establish that the defendant harbored the felonious intent either prior to or during the commission of the acts which resulted in the victim's death; evidence which establishes that the defendant formed the intent only after engaging in the fatal acts cannot support a verdict of first-degree murder based on section 189.<sup>91</sup>

The court reversed the first-degree felony-murder conviction because the prosecution failed to present any evidence that the defendant formed sexual feeling or engaged in any kind of lewd conduct towards the victim.<sup>92</sup>

In *People v. Ainsworth*, a witness saw the defendant and his accomplice approach the victim's vehicle and then drive away with the victim sitting between them.<sup>93</sup> Police later found the victim's abandoned car with a bullet casing inside. The bullet casing contained both the defendant's fingerprints and the victim's blood.<sup>94</sup> Months later, authorities discovered the victim's body with a .45 caliber copper-coated slug in her hip, which was consistent with the bullet casing found in the car.<sup>95</sup> The California Supreme Court upheld the first-degree felony-murder conviction, stating that there

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87. 70 Cal. 2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968).

88. See *id.* at 21–22, 447 P.2d at 945, 73 Cal. Rptr. at 553.

89. See *id.*

90. See *id.*

91. *Id.* at 34, 447 P.2d at 953, 73 Cal. Rptr. at 561.

92. See *id.* at 31, 447 P.2d at 951–52, 73 Cal. Rptr. at 559–60.

93. 45 Cal. 3d at 994, 755 P.2d at 1022, 248 Cal. Rptr. at 572.

94. See *id.* at 995, 755 P.2d at 1022, 248 Cal. Rptr. at 573.

95. See *id.* at 996, 755 P.2d at 1023, 248 Cal. Rptr. at 574.

"was ample evidence to support the jury's finding that the death occurred in the perpetration of the robbery."<sup>96</sup>

These cases demonstrate that although a first-degree felony-murder conviction does not require a strict causal relationship between the felony and the killing, the killing cannot be merely incidental. However, the courts are unclear about the extent of continuity required between the felonious act and the killing.

The courts have held that the first-degree felony-murder doctrine applies only if the defendant formed the requisite intent to commit the underlying felony before or during the killing.<sup>97</sup> In *Ainsworth*, eyewitness testimony of the robbery before the victim's death sufficiently established that the felony and the killing were part of one continuous transaction.<sup>98</sup> In contrast, the facts of *Hudson* and *Anderson* are problematic to those relying on the felony-murder theory. In those cases, in spite of the overwhelming evidence, the court ruled that the evidence did not establish the defendant's intent to commit the felonies.<sup>99</sup>

*d. burglary based on the intent to commit a felonious assault precludes the first-degree felony-murder doctrine*

The merger doctrine typically applies to assault-related felonies in the second-degree felony-murder context.<sup>100</sup> For a burglary based on intent to commit felonious assault, the merger doctrine precludes the application of the felony-murder doctrine, despite the fact that burglary is one of the enumerated felonies under section 189.<sup>101</sup>

In *People v. Wilson*, the killing occurred during a burglary.<sup>102</sup> The only basis for the felonious entry was assault with a deadly weapon.<sup>103</sup> The California Supreme Court extended the merger

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96. *Id.* at 1016, 755 P.2d at 1037, 248 Cal. Rptr. at 587.

97. *See Anderson*, 70 Cal. 2d at 34, 447 P.2d at 953, 73 Cal. Rptr. at 561.

98. *See Ainsworth*, 45 Cal. 3d at 994, 755 P.2d at 1022, 248 Cal. Rptr. at 572.

99. *See Hudson*, 45 Cal. 2d at 121, 287 P.2d at 497; *Anderson*, 70 Cal. 2d at 22, 447 P.2d at 945, 73 Cal. Rptr. at 553.

100. *See discussion infra* Section C.1.d.

101. *See Wilson*, 1 Cal. 3d at 442, 82 Cal. Rptr. at 501, 462 P.2d at 29-30.

102. *See id.* at 440, 82 Cal. Rptr. at 499, 462 P.2d at 28.

103. *See id.*

doctrine in the context of the first-degree felony-murder doctrine, stating that the assault is an “integral part of the homicide.”<sup>104</sup>

Burglary is one of the felonies enumerated under section 189. Nevertheless, the merger rule precludes the felony-murder doctrine for unlawful entries based on the intent to assault.<sup>105</sup> Here, the “integral part of the homicide” language suggested that the court would merge other felonies subject to the first-degree felony-murder rule.<sup>106</sup> However, recent California Supreme Court cases have limited the merger doctrine solely to assault felonies.<sup>107</sup> Thus, a burglary with the intent to commit assault is one of the very few exceptions to the otherwise strict application of the first-degree felony-murder rule.

## 2. Application of the first-degree felony-murder doctrine to provocative acts

Under the common law, the application of the felony-murder doctrine was potentially limitless since its application relieved the prosecution of having to prove deliberation or premeditation. The potential breadth of this application was particularly evident in cases where the defendant’s perpetration of felonies provoked victims or law enforcement officials into killing another.

The California Supreme Court’s opinion in *People v. Washington* reflects a view of the felony-murder doctrine that is decidedly narrower than the view according to the common law.<sup>108</sup> *Washington* involved a defendant and his accomplice who robbed a gasoline station.<sup>109</sup> The accomplice pointed a gun at the attendant, but the attendant responded by firing his own gun at the accomplice, killing him.<sup>110</sup> The court held that, despite provoking the attendant

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104. *See id.*

105. *See id.* at 442, 462 P.2d at 29, 82 Cal. Rptr. at 501.

106. *See Hansen*, 9 Cal. 4th at 313–14, 885 P.2d at 1029, 36 Cal. Rptr. 2d at 616.

107. *See, e.g., People v. Malfavon*, 102 Cal. App. 4th 727, 125 Cal. Rptr. 2d 618 (2002) (merger rule is triggered only when the underlying felony was assault); *People v. Johnson*, 15 Cal. App. 4th 169, 175, 18 Cal. Rptr. 2d 650, 654 (court recognized that the “underlying felony must have a purpose other than the assault for the felony-murder rule to apply”).

108. *Washington*, 62 Cal. 2d at 777, 402 P.2d at 130, 44 Cal. Rptr. at 442.

109. *See id.* at 779, 402 P.2d at 132, 44 Cal. Rptr. at 444.

110. *See id.*



into killing his accomplice, the first-degree felony-murder rule did not apply to the defendant because he did not commit the killing in perpetration or attempt to perpetrate robbery.<sup>111</sup> The court interpreted section 189 as requiring that the felon or his accomplice commit the killing.<sup>112</sup> To consider the acts of the victim as those of the accomplice "would expand the meaning of the words 'murder . . . which is committed in the perpetration . . . [of] robbery . . . ' beyond common understanding."<sup>113</sup> The *Washington* decision reversed *People v. Harrison*, where the court of appeal applied the first-degree felony-murder doctrine under the similar circumstances of defendants provoking a robbery victim into firing a gun that accidentally shot and killed another victim.<sup>114</sup>

This provocative act scenario is distinguishable from cases involving agency or proximate cause issues, where the first-degree felony-murder doctrine is still applicable.<sup>115</sup> Defendants are responsible for both intentional and unintentional killings during the commission of a section 189 felony, including situations where the victim was not the intended target of the killing. The first-degree felony-murder doctrine further applies to killings that the accomplice caused during the commission of a felony. Thus, the courts draw the line when anyone other than the defendant or an accomplice—e.g., a victim, a police officer, or any other involved person—is provoked, and kills.

### 3. Challenges to the first-degree felony-murder doctrine

While both courts and scholars have criticized the felony-murder doctrine as an artificial concept, worthy of only a narrow application, the first-degree felony-murder doctrine is a statutory concept that is the law in California. Because of this fact, there have been very few challenges made against the felony-murder doctrine itself.

*People v. Dillon* represents one of the few decisions involving challenges to the first-degree felony-murder doctrine.<sup>116</sup> The trial

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111. See *id.* at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.

112. See *id.*

113. *Id.*

114. 176 Cal. App. 2d 330, 345, 1 Cal. Rptr. 414, 424–25 (1959).

115. See discussion Agency and Proximate Cause in Felony-Murder *infra* Section D.

116. 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983).

court convicted the defendant of first-degree felony-murder and attempted robbery.<sup>117</sup> On appeal, the defendant contended that the first-degree felony-murder doctrine was an uncodified common law rule that the court should abolish.<sup>118</sup> Moreover, the defendant argued that even if the felony-murder rule were a statutory doctrine, it unconstitutionally presumes the existence of purpose to kill.<sup>119</sup>

The California Supreme Court reviewed the “dubious origins” of the felony-murder doctrine, which revealed that section 189, as originally enacted, may have been merely a degree-fixing statute and not a codification of the first-degree felony-murder rule.<sup>120</sup> However, the court held that its “shaky . . . historical foundation” was irrelevant because the legislature has treated section 189 as a codification of the first-degree felony-murder doctrine.<sup>121</sup> Accordingly, the courts could not judicially abolish the rule.<sup>122</sup>

The California Supreme Court also rejected the defendant’s constitutional challenge, stating that the felony-murder doctrine does not presume purpose to kill, because as a matter of law, it is not an element of felony-murder.<sup>123</sup> Because the rule does not presume purpose to kill, it neither unconstitutionally denies due process nor makes an irrational connection “between the fact proved (here, felonious intent) and the fact presumed (malice).”<sup>124</sup>

The first-degree felony-murder rule is a statutory doctrine that is codified under section 189 of the Penal Code. Despite the objections to the felony-murder doctrine, the court cannot judicially abrogate the rule because it is a legislative creation.

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117. *See id.* at 450, 668 P.2d at 700, 194 Cal. Rptr. at 393.

118. *See id.* at 462, 668 P.2d at 708, 194 Cal. Rptr. at 401.

119. *See id.*

120. *See id.* at 462–63, 668 P.2d at 708–09, 194 Cal. Rptr. at 401–02.

121. *Id.* at 471–72, 668 P.2d at 715, 194 Cal. Rptr. at 408.

122. *See id.* at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19.

123. *See id.* at 475, 668 P.2d at 718, 194 Cal. Rptr. at 411.

124. *See id.* at 476. Other jurisdictions have also addressed the constitutionality of the felony-murder doctrine. *See Ulster County Court v. Allen*, 442 U.S. 140, 165 (1979) (citing *Leary v. United States*, 395 U.S. 6, 36 (1969) which addressed the constitutionality of the felony-murder doctrine); *Tot v. United States*, 319 U.S. 463, 467–68 (1943).

### C. Second-Degree Felony-Murder

"All kinds of murders other than those specified as first degree are murders of the second degree."<sup>125</sup> Second-degree felony-murder is an alternative to unpremeditated murder with express purpose to kill, or implied malice murder.<sup>126</sup> It is similar to first-degree felony-murder, where the killing occurs during the perpetration of a felony, except that the underlying felony is not one of the felonies enumerated under section 189.<sup>127</sup>

While the second-degree felony-murder doctrine has the same effect as its first-degree counterpart, the second-degree felony-murder doctrine is limited in its application. At first glance, the second-degree felony-murder rule appears broad because it potentially applies to any felony that results in a killing, and it is not limited solely to statutorily enumerated felonies.<sup>128</sup> However, the elements of the second-degree felony-murder doctrine suggest otherwise.

The second-degree felony-murder doctrine is a common law rule, and its many strictures reflect the court's disfavor of the felony-murder theory in general.<sup>129</sup> Some courts believe that the doctrine wrongly convicts people for murder without having to prove the standard mens rea requirement.<sup>130</sup>

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125. DALTON & KNIGHTEN, *supra* note 3, § 5:6[A] (2002); see CAL. PENAL CODE § 189 (West 2002); CALJIC, *supra* note 10, No. 8.30 ("Murder of the second-degree is [also] the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation").

126. See DALTON & KNIGHTEN, *supra* note 7, § 5:6[A]; see also CALJIC, *supra* note 10, No. 8.30 (jury instructions on second-degree express malice murder); *Id.* No. 8.31 (jury instructions on second-degree implied malice murder).

127. See WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 7, § 174.

128. See *id.*

129. See *Dillon*, 34 Cal. 3d at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19 (characterizing the felony-murder doctrine as "an almost universally disfavored rule" and that "the second-degree felony-murder rule remains, as it has been since 1872, a judge-made doctrine without any express basis in the Penal Code").

130. See, e.g., *Washington*, 62 Cal. 2d at 783, 402 P.2d at 134, 44 Cal. Rptr. at 446 ("felony-murder rule has been criticized on the grounds that in almost all cases in which it is applied it is unnecessary and that it erodes the relation between criminal liability and moral culpability").

### 1. Elements of the second-degree felony-murder doctrine

The second-degree felony-murder doctrine applies if a killing occurred during the perpetration of an inherently dangerous felony.<sup>131</sup> Whether a felony is inherently dangerous is a question of law for the courts to decide based on the felony in its abstract, rather than the particular facts of the case. Even if the predicate felony is determined to be inherently dangerous, the felony-murder doctrine does not apply if that felony merges with the resulting homicide.

#### *a. felony must be inherently dangerous*

The second-degree felony-murder doctrine applies only if the killing resulted from the perpetration of a felony that is inherently dangerous.<sup>132</sup> An act is inherently dangerous to human life when there is "a high degree of probability that it will result in death."<sup>133</sup> This requirement is considerably narrower than in the past, when killings perpetrated during any felony were deemed to be murder.<sup>134</sup>

In *People v. Ford*, for example, the defendant kidnapped his wife and another person.<sup>135</sup> When a deputy sheriff stopped the defendant in his car and ordered him to hand over his gun, the defendant fired at the officer, killing him.<sup>136</sup> In affirming the trial court's refusal to issue a manslaughter instruction, the California Supreme Court stated that, as a matter of law, "[a] homicide that is a direct causal result of the commission of a felony inherently dangerous to human life (other than [those] felonies enumerated in Cal. Penal Code section 189) constitutes at least a second-degree murder."<sup>137</sup> The court observed that at the time of the shooting, the

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131. See discussion, *supra* Section B.1.c.

132. See *Patterson*, 49 Cal. 3d at 626–27, 778 P.2d at 558, 262 Cal. Rptr. at 204.

133. *People v. Davenport*, 41 Cal. 3d 247, 262, 710 P.2d 861, 869, 221 Cal. Rptr. 794, 802 (1985); *People v. Thomas*, 41 Cal. 2d 470, 480, 261 P.2d 1, 22 (1953).

134. See, e.g., *People v. Poindexter*, 51 Cal. 2d 142, 330 P.2d 763 (1958) (second-degree felony-murder conviction based on administering narcotics to a minor upheld) (overruled on another ground by *Patterson*, 49 Cal. 3d at 625, 778 P.2d at 557, 262 Cal. Rptr. at 203); *People v. Powell*, 34 Cal. 2d 196, 208 P.2d 974 (1949) (second-degree felony-murder conviction based on abortion upheld).

135. 60 Cal. 2d at 782–83, 388 P.2d at 899, 36 Cal. Rptr. at 627.

136. See *id.*

137. *Id.* at 795, 388 P.2d at 907, 36 Cal. Rptr. at 635.

defendant was still in the commission of kidnapping, which was "inherently dangerous to human life, and 'the killing had a direct causal relationship to the [crimes] being committed.'"<sup>138</sup> Thus, under the felony-murder rule, the homicide qualified as being at least a second-degree murder.<sup>139</sup>

While the *Ford* court only observed that a killing resulting from the commission of an inherently dangerous felony deserves at least a second-degree conviction, it did not make the second-degree conviction an absolute requirement.<sup>140</sup> The California Supreme Court eventually approved this formulation.<sup>141</sup> For example, in *People v. Williams*, the defendants stabbed the victim to death during an affray with the victim, who was a methedrine supplier.<sup>142</sup> The California Supreme Court reversed the trial court's instruction requiring the jury to find the defendants guilty of second-degree felony-murder if they found that the killing occurred during a conspiracy to obtain methedrine.<sup>143</sup> The court stated that although the purpose of the felony-murder rule, which is "to deter felons from killing negligently or accidentally . . . may be well served with respect to felonies such as robbery or burglary . . . it has little relevance to a felony which is not inherently dangerous."<sup>144</sup>

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138. *Ford* at 795, 388 P.2d at 907, 36 Cal. Rptr. at 636 (quoting *People v. Robillard*, 55 Cal. 2d 88, 98 (1960)).

139. *See id.* Today, § 207 kidnapping is one of the enumerated felonies under § 189, and any killing during such felony invokes the first-degree felony-murder rule. *See* CAL. PENAL CODE § 189 (West 2002). Here, the court also applied the second-degree felony-murder doctrine under conviction of § 12021, for possession of a concealable weapon by an ex-felon. *See id.* However, commission of a § 12021 crime does not trigger the second-degree felony-murder doctrine today because of the California Supreme Court's holding in *Satchell*, where the court stated that the "mere possession *in itself*—ignore[es] the propensities and conduct of the possessor—is essentially neutral in its intentional aspect and should not serve as the basis for the imputation of malice." 6 Cal. 3d at 43, 489 P.2d at 1372, 98 Cal. Rptr. at 44.

140. *See Ford* at 795–96, 388 P.2d at 907–08, 36 Cal. Rptr. at 635–36.

141. *See, e.g., Washington*, 62 Cal. 2d at 780, 402 P.2d at 133, 44 Cal. Rptr. at 445 (the court stated that "the felony-murder doctrine ascribes malice aforethought to the felon who kills in the perpetration of an inherently dangerous felony"); *Williams*, 63 Cal. 2d at 457, 406 P.2d at 630, 47 Cal. Rptr. at 10 (1965) (the court referring to *Washington* as the case in which it approved the "*Ford* formulation").

142. 63 Cal. 2d 452, 406 P.2d 647, 47 Cal. Rptr. 7 (1965).

143. *See id.* at 455, 406 P.2d at 648, 42 Cal. Rptr. at 8.

144. *Id.* at 457 n.4, 406 P.2d at 650 n.4, 47 Cal. Rptr. at 10 n.4.

Conversely, the court reasoned that “[i]f the felony is not inherently dangerous it is highly improbable that the potential felon will be deterred” because “he will not anticipate that any injury or death might arise solely from the fact that that he will commit the felony.”<sup>145</sup> The court held that the felony, conspiracy to possess methedrine, was not inherently dangerous.<sup>146</sup>

Therefore, the courts rely on the inherently dangerous analysis because it is consistent with the goal of the felony-murder doctrine, which is to deter felons from killing negligently or accidentally while committing a felony. As such, a great majority of cases involving second-degree felony-murder now focus on whether the underlying felony is inherently dangerous to human life.<sup>147</sup>

*b. felony must be analyzed in the abstract*

In deciding whether the underlying felony was inherently dangerous to human life, the courts look to the elements of the felony in the abstract, not to the facts surrounding a particular killing. The Supreme Court imposed this view-in-the-abstract approach in order to prevent the circumstances surrounding the death of the victim

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145. *Id.*

146. *See id.* at 458, 406 P.2d at 650, 74 Cal. Rptr. at 10.

147. Cases where courts deemed that the predicate felonies were inherently dangerous include the following: *Hansen*, 9 Cal. 4th 300, 885 P.2d 1022, 36 Cal. Rptr. 609 (shooting at an inhabited dwelling); *People v. Clem*, 78 Cal. App. 4th 346, 92 Cal. Rptr. 2d 727 (2000) (grossly negligent discharge of firearm); *People v. James*, 62 Cal. App. 4th 244, 74 Cal. Rptr. 2d 7 (1998) (manufacturing methamphetamine); *People v. Johnson*, 15 Cal. App. 4th 169, 18 Cal. Rptr. 2d 650 (1993) (reckless driving to elude a peace officer); *People v. Morse*, 2 Cal. App. 4th 620, 3 Cal. Rptr. 2d 343 (1992) (reckless possession of a bomb). On the contrary, the courts deemed the following cases as not inherently dangerous: *People v. Smith*, 62 Cal. App. 4th 1233, 72 Cal. Rptr. 2d 918 (1998) (extortion); *People v. Taylor*, 6 Cal. App. 4th 1084, 8 Cal. Rptr. 2d 439 (1992) (furnishing PCP); *People v. Caffero*, 207 Cal. App. 3d 678, 255 Cal. Rptr. 22 (1989) (child abuse); *People v. Burroughs*, 35 Cal. 3d 824, 678 P.2d 894, 201 Cal. Rptr. 319 (1984) (practice of medicine without a license) (overruled on another ground by *People v. Blakeley*, 23 Cal. 4th 82, 89, 999 P.2d 675, 679, 96 Cal. Rptr. 2d 451, 455 (2000)); *People v. Henderson*, 19 Cal. 3d 86, 560 P.2d 1180, 137 Cal. Rptr. 1 (1977) (false imprisonment) (overruled on another ground by *Flood*, 18 Cal. 4th at 490 n.12, 957 P.2d at 882 n.12, 76 Cal. Rptr. 2d at 193 n.12); *Satchell*, 6 Cal. 3d 28, 489 P.2d 1361, 98 Cal. Rptr. 33 (possession of a firearm by a felon).

from swaying the courts into applying the second-degree felony-murder doctrine.

In *People v. Williams*, the California Supreme Court elaborated on the view-in-the-abstract approach.<sup>148</sup> In holding that a conspiracy to possess methedrine is not inherently dangerous, the majority rejected prior decisions in which courts determined the inherent danger of a felony based on (1) the particular circumstances of a case; and (2) whether the resulting death was "an expectable incident of the felony."<sup>149</sup>

In *People v. Burroughs*, the California Supreme Court reversed the second-degree felony-murder conviction of the defendant, a self-proclaimed "healer," who treated the victim without a medical license.<sup>150</sup> There, the California Supreme Court explained that the *Williams* court's viewed-in-the-abstract analysis is necessary because every case that potentially applies the second-degree felony-murder rule involves a killing.<sup>151</sup> The majority feared that courts would apply the rule simply because "the existence of the dead victim might appear to lead inexorably to the conclusion that the underlying felony is exceptionally hazardous."<sup>152</sup>

In determining the inherent dangerousness of a felony, the courts impose a viewed-in-the-abstract approach in order to prevent courts from imposing their normative views, which could lead to potentially

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148. *Williams*, 63 Cal. 2d at 457, 406 P.2d at 649, 47 Cal. Rptr. at 9.

149. *See id.* In *People v. Pulley*, 225 Cal. App. 2d 366, 37 Cal. Rptr. 376 (1964) (overruled by *Williams*, 63 Cal. 2d at 458, 406 P.2d at 650, 47 Cal. Rptr. at 10), the defendants were driving a stolen vehicle at seventy to eighty miles an hour, while evading a pursuit by a traffic officer. They killed a man when their car ran a red light and collided into traffic and cars proceeding with the green light. *See id.* at 368, 37 Cal. Rptr. at 377. In rejecting the defendant's contention that the felony-murder doctrine should be limited with respect to felonies that are not dangerous to human life, the court of appeals reviewed the particular facts involved in the case, rather than viewing the elements in the abstract. The court observed that, "[b]y any reasonable standard, stealing and driving a stolen car and endeavoring to escape pursuing officers with the stolen car, entering an intersection against all rules of the road at seventy to eighty miles per hour and crashing with other cars lawfully proceeding therein, is highly dangerous." *Id.* at 373, 37 Cal. Rptr. at 380. It concluded that, in such circumstance, death was "not a freak coincidence, but an expectable incident of the felony." *Id.*

150. 35 Cal. 3d at 826, 678 P.2d at 895, 201 Cal. Rptr. at 320.

151. *See id.* at 830, 678 P.2d at 898, 201 Cal. Rptr. at 323.

152. *Id.*

prejudicial results. Moreover, fairness requires the court to objectively construe the underlying statute, especially because all potential felony-murder doctrine issues involve a dead victim. Thus, the courts are to analyze each statutory offense objectively.

*c. the inherent dangerousness of each statutory offense is determined separately*

In order to determine whether an underlying felony is inherently dangerous, courts examine the statutory definition of the applicable felony. As such, the question of whether a felony is inherently dangerous is a matter of statutory construction.

In *Burroughs*, the court held that the inherent dangerousness of a felony is determined by the statutory definition as a whole, "taking into account even nonhazardous ways of violating the provisions of the law which do not necessarily pose a threat to human life."<sup>153</sup> The court examined the language of California Business and Professions Code section 2053,<sup>154</sup> and held the conduct at issue was not inherently dangerous because "one may violate the proscription against the felonious practice of medicine without a license and yet not necessarily endanger human life."<sup>155</sup>

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153. *Id.* However, the inherent dangerousness of a statute having multiple offenses may be analyzed separately based on the particular offense, which is the basis for the application of the second-degree felony-murder doctrine. See *Patterson*, 49 Cal. 3d at 625, 778 P.2d at 556, 262 Cal. Rptr. at 202.

154. CAL. BUS. & PROF. CODE § 2053 (West 2002) states:

Any person who willfully, under circumstances or conditions which cause or create a risk of great bodily harm, serious physical or mental illness, or death, practices or attempts to practice, or advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked and suspended certificate as provided in this chapter, or without being authorized to perform that act pursuant to a certificate obtained in accordance with some other provision of law, is punishable by imprisonment in the county jail for not exceeding one year or in the state prison.

155. *Burroughs*, 35 Cal. 3d at 830, 678 P.2d at 898, 201 Cal. Rptr. at 323; see also *Henderson*, 19 Cal. 3d 86, 560 P.2d 1180, 137 Cal. Rptr. 1 (holding that Cal. Penal Code § 237, false imprisonment, is not inherently dangerous because it is effectuated by *either* violence, menace, fraud or deceit); *People v. Lopez*, 6 Cal. 3d 45, 51, 489 P.2d 1372, 1376, 98 Cal. Rptr. 44, 48 (1971)



The court of appeal faced a similar issue in *People v. Caffero*.<sup>156</sup> There, the defendants were charged with second-degree felony-murder after their infant daughter died from an E. coli infection that resulted from a lack of proper hygiene.<sup>157</sup> The second-degree felony-murder charge was based on the felony child abuse provision in Penal Code section 237(a)(1). Relying on *Burroughs*, the court of appeal stated that if a statute may be violated by conduct that does not endanger human life, it is not inherently dangerous to human life.<sup>158</sup> It held that section 237(a)(1) is implicated in a wide range of circumstances, including either life-threatening or non-life-threatening circumstances.<sup>159</sup>

The California Supreme Court further elaborated on the issue of statutory construction in *People v. Patterson*.<sup>160</sup> The case involved a defendant who furnished cocaine to the victim, who died after ingesting it.<sup>161</sup> The defendant faced a second-degree felony-murder charge for furnishing cocaine, a felony under California Health and Safety Code section 11352.<sup>162</sup> The court found that more than one-hundred controlled substances fell within the confines of section 11352, and the legislature did not proscribe separate statutes for each of the offenses because it appeared to be more convenient.<sup>163</sup> For a statute having multiple offenses, the court held that "each offense set forth in the statute should be examined separately to determine its inherent dangerousness."<sup>164</sup> In remanding the case, the court instructed the trial court to determine whether the commission of the

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(court held that Cal. Penal Code § 4352 is not inherently dangerous because it constitutes "a multitude of sins" including both violent and nonviolent type of escape).

156. 207 Cal. App. 3d 678, 255 Cal. Rptr. 22 (1989).

157. *See id.* at 681-82, 255 Cal. Rptr. at 24.

158. *See id.*

159. *See id.* at 683, 255 Cal. Rptr. at 25. Cal. Penal Code § 273(a)(1) shares the same grammatical structure found significant in *Burroughs* in that it separates the life-threatening risk, 'death,' from the non-life-threatening risk, 'great bodily harm,' with the disjunctive "or." *Id.*

160. 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

161. *See id.* at 617, 778 P.2d at 551, 262 Cal. Rptr. at 197.

162. *See id.*

163. *See id.* at 625, 778 P.2d at 556, 262 Cal. Rptr. at 202.

164. *Id.*

statutory offense at issue involved “a *high probability* that it will result in death.”<sup>165</sup>

The California Court of Appeal cases *People v. Johnson*,<sup>166</sup> *People v. Sewell*,<sup>167</sup> and *People v. Sanchez*,<sup>168</sup> all involve second-degree felony-murder charges based on the defendant’s attempt to elude a pursuing police officer. In *Johnson* and *Sewell*, the underlying felony involved California Vehicle Code section 2800.2.<sup>169</sup> In each case, the court stated that conduct under section 2800.2 is an inherently dangerous felony because its key element is the “willful or wanton disregard for the safety of persons or property.”<sup>170</sup> In *Sanchez*, however, the court came to the opposite conclusion when they determined that section 2800.3, a statute that amended and replaced section 2800.2, did not make conduct within its purview inherently dangerous.<sup>171</sup> There, the court found that the statutory language of section 2800.2 differed significantly from the wording of section 2800.3 in that section 2800.3 covered a wide range of circumstances, including conduct that proximately caused death or serious bodily injury.<sup>172</sup>

*Burroughs* and *Caffero* demonstrate that a determination of inherent dangerousness depends on statutory construction.<sup>173</sup> Each case shows that a statute makes conduct inherently dangerous if its language shows a possibility of violation by an act that does not produce a high probability of death. The statutory interpretation in *Patterson* was distinguishable from these cases because *Patterson*

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165. *Id.* at 627, 778 P.2d at 558, 262 Cal. Rptr. at 209.

166. 15 Cal. App. 4th 169, 172–73, 18 Cal. Rptr. 2d 650, 652–53 (1993).

167. 80 Cal. App. 4th 690, 95 Cal. Rptr. 2d 600 (2000).

168. 86 Cal. App. 4th 970, 103 Cal. Rptr. 2d 809 (2001).

169. *See Sewell*, 80 Cal. App. 4th at 693, 95 Cal. Rptr. 2d at 602 (stating that Cal. Vehicle Code § 2800.2 makes it a felony for a person who “flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 . . . and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property . . .”) (emphasis omitted); *Johnson*, 15 Cal. App. 4th at 173, 18 Cal. Rptr. 2d at 653.

170. *Johnson*, 15 Cal. App. 4th at 173, 18 Cal. Rptr. 2d at 653.

171. *See Sanchez*, 86 Cal. App. 4th at 977, 103 Cal. Rptr. 2d at 813–14 (stating that Cal. Vehicle Code § 2800.3 makes it a felony when “willful flight or attempt to elude a pursuing peace officer in violation of Section 2800.1 proximately causes death or serious bodily injury to any person.”).

172. *See id.* at 980, 103 Cal. Rptr. 2d at 815.

173. *See Burroughs*, 35 Cal.3d at 830, 678 P.2d at 898, 201 Cal. Rptr. at 323; *Caffero*, 207 Cal. App. 3d at 683, 255 Cal. Rptr. at 25.

involved a single statute that proscribed multiple offenses. In contrast, *Burroughs* and *Caffero* examined statutes that proscribed one offense that could be committed by numerous different acts, including acts that are not inherently dangerous.<sup>174</sup> Finally, *Johnson*, *Sewell*, and *Sanchez* represent a series of cases where the inherent dangerousness of a felony depends on the precise statutory language. Note that although each defendant in the cited cases essentially acted in the same manner, the second-degree felony-murder doctrine was inapplicable against one of them because the statutory language altered the inherency of its danger.<sup>175</sup>

Courts depend on the statutory language of the underlying offense to objectively determine the inherently dangerous nature of a felony. Despite the fact that fairness requires a determination of the inherent danger, cases such as *Johnson*, *Sewell*, and *Sanchez* reveal that the felony-murder doctrine can produce rather arbitrary results. Because of this possibility, courts reluctantly apply the felony-murder doctrine and place limitations on it, such as the merger doctrine.

*d. the "merger" rule precludes the application of the felony-murder doctrine if the underlying felony is assault*

Even if the predicate felony is inherently dangerous to human life, the court may preclude the application of the felony-murder doctrine if the felony "merged" with the resulting homicide.<sup>176</sup> The court's adoption of the merger doctrine has spurred a renewed debate over the second-degree felony-murder doctrine, despite its present limitations.

As the merger doctrine developed in other jurisdictions, it established that the felony-murder doctrine does not apply where the only underlying felony is assault.<sup>177</sup> In such a circumstance, the

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174. See *id.*

175. See *Sewell*, 80 Cal. App. 4th at 693, 95 Cal. Rptr. 2d at 602; *Johnson*, 15 Cal. App. 4th at 173, 18 Cal. Rptr. 2d at 653; *Sanchez*, 86 Cal. App. 4th at 977, 980, 103 Cal. Rptr. 2d at 813-15.

176. See *People v. Ireland*, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969).

177. See *Hansen*, 9 Cal. 4th at 311, 885 P.2d at 1028, 36 Cal. Rptr. 2d at 615; see also *People v. Huter*, 184 N.Y. 237 (1906) (court held that the defendant's alleged killing of an officer while resisting arrest for burglary was

assault is regarded as having merged with the resulting homicide.<sup>178</sup> The merger doctrine singles out assault because homicide generally results from the commission of an assault, and if assault constituted one of the underlying felonies for felony-murder, the distinction between first and second-degree murder would be obliterated.<sup>179</sup> Any application of the felony-murder doctrine based on assault would relieve the prosecution of having to prove mens rea in a majority of homicide cases.<sup>180</sup> Thus, as one commentator noted, the inapplicability of the merger rule to assaults is "supported by the policy of preserving some meaningful domain in which the Legislature's careful gradation of homicide offenses can be implemented."<sup>181</sup>

In *People v. Ireland*, the defendant was convicted of second-degree murder after he shot and killed his wife during a dispute.<sup>182</sup> On appeal, the defendant contended that the trial court erred by giving the jury a second-degree felony-murder instruction based on assault with a deadly weapon.<sup>183</sup> The California Supreme Court agreed with the defendant, stating that the use of the felony-murder doctrine in this situation extends the doctrine "beyond any rational function that [it] is designed to serve."<sup>184</sup> The court explained that because a great majority of homicides result from felonious assault, use of the felony-murder doctrine unnecessarily "bootstraps" the

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assault in the second-degree and that the act merged with the homicide); *Buel v. People*, 18 Hun 487 (3d Dep't 1879), *aff'd* 78 N.Y. 492 (1879) (where the defendant unintentionally killed the victim while raping her, the court denied his contention that the felony merged with the homicide because the two felonies were "so distinct that they [could] not be included in the same indictment").

178. *See id.*

179. *See id.*; *see also* Note, *The Doctrine of Merger in Felony-Murder and Misdemeanor—Manslaughter*, 35 ST. JOHN'S L. REV. 109, 117 (1960) (describing that, in New York, the merger rule was adopted "[i]n order to properly preserve the distinction between the degrees of murder and between murder and manslaughter").

180. *See Hansen*, 9 Cal. 4th at 311, 885 P.2d at 1028, 36 Cal. Rptr. 2d at 615.

181. *Id.* at 312, 885 P.2d at 1028, 36 Cal. Rptr. 2d at 615.

182. 70 Cal. 2d at 527, 450 P.2d at 582, 75 Cal. Rptr. at 190.

183. *See id.* at 538, 450 P.2d at 589, 75 Cal. Rptr. at 197.

184. *Id.* at 539, 450 P.2d at 590, 75 Cal. Rptr. at 198 (quoting *People v. Washington*, 62 Cal. 2d 777, 783 (1965)).

requisite mens rea for murder without ever having to consider it.<sup>185</sup> In adopting the merger doctrine for the first time, the court held that "second-degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged."<sup>186</sup>

Subsequent decisions following *Ireland* tested the applicability of the merger doctrine for various felonies.<sup>187</sup> For example, in *People v. Landry*, similar to *Ireland*, the underlying felony was assault with a deadly weapon.<sup>188</sup> There, the defendant was assaulting the victim's friend with a gun when the victim appeared.<sup>189</sup> The defendant's accomplice, who was next to the defendant, shot and killed the victim.<sup>190</sup> Relying on *Ireland*, the California Court of Appeal held that the merger doctrine precluded a second-degree felony-murder instruction against the defendant.<sup>191</sup>

In the companion cases *People v. Schockley*<sup>192</sup> and *People v. Smith*,<sup>193</sup> both involving child abuse felonies, the courts further demarcated the line between felonies that merge and felonies that do not merge. In *Schockley*, the defendant was tried for second-degree felony-murder based on willful cruelty and endangerment after she

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185. *See id.*

186. *Id.* (emphasis added). Although the *Ireland* court did not specify how they derived the phrase "integral part of the homicide," it appears to have been derived from the law review article: *The Doctrine of Merger in Felony—Murder and Misdemeanor—Manslaughter*, *supra* note 179, at 118.

187. *See, e.g.,* *People v. Mahle*, 273 Cal. App. 2d 309, 78 Cal. Rptr. 360 (1969) (where the defendant had been convicted of second-degree murder for stabbing his wife to death while intoxicated); *see also* *People v. Carlson*, 37 Cal. App. 3d 349, 112 Cal. Rptr. 321 (1974) (where the defendant had been convicted of voluntary manslaughter and second-degree murder for the killing of an unborn child and mother, where the death of the fetus was caused by the death of the mother); *People v. Jenkins*, 275 Cal. App. 2d 545, 80 Cal. Rptr. 257 (1969) (where the defendant had been convicted of second-degree murder for shooting the victim to death even though he claimed to have an abnormal mental condition).

188. 212 Cal. App. 3d 1428, 261 Cal. Rptr. 254 (1989).

189. *See id.* at 1431, 261 Cal. Rptr. at 255.

190. *See id.*

191. *See id.* at 1438–39, 261 Cal. Rptr. at 260.

192. 79 Cal. App. 3d 669, 145 Cal. Rptr. 200 (1978).

193. 35 Cal. 3d 798, 678 P.2d 886, 201 Cal. Rptr. 311 (1984) (overruled on another ground by *People v. Felix*, 22 Cal. 4th 651, 657, 995 P.2d 186, 190, 94 Cal. Rptr. 2d 54, 59 (2000)).

malnourished and dehydrated her infant son to death.<sup>194</sup> The Court of Appeal held that the felony did not merge with the killing because it is “based on an independent felony not related to the assault causing murder . . . .”<sup>195</sup> However, the California Supreme Court in *Smith* applied the merger rule because the underlying felony involved a child beating.<sup>196</sup>

When the *Ireland* court adopted the merger doctrine, the amorphous “integral part of the homicide” language raised growing speculation that the courts would apply the merger doctrine to all felonies closely related to a homicide, and thereby circumscribe the felony-murder doctrine.<sup>197</sup> Despite this concern, the cases following *Ireland* failed to expand the scope of the merger rule because all the cases where the underlying felony had merged with the resulting homicide involved assaultive felonies. Although it seemed plausible that a felony unrelated to assault could be characterized as “an integral part of the homicide,” the courts have never extended the *Ireland* doctrine beyond the context of assault.<sup>198</sup>

The California Supreme Court sought to clarify this issue in *People v. Mattison*.<sup>199</sup> The defendant in *Mattison* was a prisoner who supplied methyl alcohol to an alcoholic inmate. The methyl alcohol subsequently killed the inmate.<sup>200</sup> The California Supreme Court rejected the defendant’s contention that the merger rule precluded the application of the second-degree felony-murder doctrine.<sup>201</sup> The court explained that the merger rule did not apply because the defendant had not committed the felonious act with the

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194. See *Schockley*, 79 Cal. App. 3d at 673, 145 Cal. Rptr. at 201.

195. *Id.* at 676, 145 Cal. Rptr. at 203.

196. See *Smith*, 35 Cal. 3d at 801, 678 P.2d at 887, 201 Cal. Rptr. at 312.

197. See *Hansen*, 9 Cal. 4th at 313–14, 885 P.2d at 1029, 36 Cal. Rptr. 2d at 616.

198. See *id.*

199. 4 Cal. 3d 177, 481 P.2d 193, 93 Cal. Rptr. 185 (1971).

200. See *id.* at 180–81, 481 P.2d at 195, 93 Cal. Rptr. at 187. The defendant was charged with second-degree felony-murder based on Cal. Penal Code § 347 (West 1999 & Supp. 2003) for willfully furnishing poisonous substance. See CAL. PENAL CODE § 189 (West 2002) (killing by means of a poisonous substance, based on willfulness, deliberation or premeditation, is first-degree murder; without the necessary mens rea for murder, it is second-degree murder based on the felony-murder doctrine).

201. See *Mattison*, 4 Cal. 3d at 185–86, 481 P.2d at 198–99, Cal. Rptr. at 190.

intent to commit an injury that would result in death.<sup>202</sup> The court concluded that the application of the felony-murder rule was proper because the underlying felony was committed with a "collateral and independent felonious design."<sup>203</sup>

*People v. Hansen* is the California Supreme Court's latest pronouncement on the merger rule.<sup>204</sup> The case involved a defendant who fired a handgun repeatedly at an apartment building striking a child occupant and killing her.<sup>205</sup> The defendant was found guilty of second-degree felony-murder based on discharging a firearm at an inhabited dwelling.<sup>206</sup> On appeal, the defendant contended that the second-degree felony-murder instruction was erroneous because the felony had merged with the resulting homicide.<sup>207</sup> The California Supreme Court examined the "integral part of the homicide" language in *Ireland* and the "collateral and independent felonious design" language of *Mattison*.<sup>208</sup> The majority rejected *Ireland's* "integral part of the homicide" language as the determinative test in the existence of merger.<sup>209</sup> The court stated that this language would preclude the felony-murder rule from applying to felonies that are most likely to result in death, making the felony-murder doctrine inapplicable to felonies where the perpetrator can foresee the likelihood that death may result, negligently or accidentally.<sup>210</sup> This in turn would undermine the purpose of the felony-murder doctrine, deterring felons from killing negligently or accidentally.

However, the court did not adopt *Mattison's* language either because "a felon who acts with a purpose other than specifically to inflict injury upon someone . . . is subject to greater criminal liability for an act resulting in death than a person who actually intends to injure the person of the victim."<sup>211</sup> Rather, the court looked at whether the use of certain inherently dangerous felonies "as the predicate felony supporting application of the felony-murder rule

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202. *See id.*

203. *Id.*

204. 9 Cal. 4th 300, 885 P.2d 1022, 36 Cal. Rptr. 2d 609 (1994).

205. *See id.* at 306, 885 P.2d at 1024, 36 Cal. Rptr. 2d at 611.

206. *See id.* at 307, 885 P.2d at 1025, 36 Cal. Rptr. 2d at 612.

207. *See id.*

208. *See id.* at 312-16, 885 P.2d at 1028-32, 36 Cal. Rptr. 2d at 615-19.

209. *See id.* at 314, 885 P.2d at 1030, 36 Cal. Rptr. 2d at 617.

210. *See id.*

211. *Id.* at 315, 885 P.2d at 1030, 36 Cal. Rptr. 2d at 617.

[would] elevate all felonious assaults to murder or otherwise subvert the legislative intent.”<sup>212</sup> The majority held that most homicides do not result from violations of willfully discharging a firearm at a dwelling house. Furthermore, a second-degree felony-murder instruction would not preclude the jury from “considering the issue of malice aforethought in the great majority of all homicides.”<sup>213</sup> Although the *Hansen* court did not explicitly state that the merger doctrine applies only to assaultive felonies, the lower courts have interpreted the decision as placing such a limitation.<sup>214</sup>

The *Hansen* court’s conclusion suggests a reversal of its predecessor courts’ narrow application of the disfavored felony-murder doctrine.<sup>215</sup> The majority’s limitation on the merger rule makes the felony-murder rule less restrictive; in spite of all the past criticism.<sup>216</sup>

## 2. Challenges made against the second-degree felony-murder doctrine

Since 1872, the second-degree felony-murder doctrine existed in California as “a judge-made doctrine without any express basis in the Penal Code.”<sup>217</sup> The felony-murder doctrine has endured much

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212. *Id.*

213. *Id.*

214. See, e.g., *People v. Malfavon*, 102 Cal. App. 4th 727, 125 Cal. Rptr. 2d 618 (2002) (merger rule triggers only when the underlying felony was assault); *People v. Baker*, 74 Cal. App. 4th 243, 87 Cal. Rptr. 2d 803 (1999) (citing the *Hansen* court’s test for the merger rule); see also, *Johnson*, 15 Cal. App. 4th at 175, 18 Cal. Rptr. 2d at 654 (court recognized that the “underlying felony must have a purpose other than the assault for the felony-murder rule to apply”).

215. See *Hansen*, 9 Cal. 4th at 314, 885 P.2d at 1030, 36 Cal. Rptr. 2d at 617.

216. See generally Gerald F. Uelman, *California Courts: The Lucas Legacy*, 1996 CAL. LAWYER 29 (May 1996). Chief Justice Lucas, who presided over the *Hansen* case, but more importantly who presided over the California Supreme Court after Justice Bird was removed from the bench, is considered to have “brought strong law-and-order credentials to the anointed task of ‘righting’ a court some perceived as having slipped off the deep left end.” *Id.* Chief Justice Lucas is also described to be “deferential to legislative authority,” and “preached judicial restraint,” seeing the “judicial creativity [of his predecessors] as the problem, rather than the solution.” *Id.*

217. *Dillon*, 34 Cal. 3d at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19 (1983). This is not to suggest that there is absolutely no statutory basis, because Penal Code § 189 has a catch-all provision, where “[a]ll kinds of



criticism, as it has been characterized by the courts as anachronistic, disfavored, unnecessarily applied in almost all cases, and eroding "the relation between criminal liability and moral culpability."<sup>218</sup> Nevertheless, the California Supreme Court has refused all invitations to abolish the felony-murder doctrine because "the concept [is] imbedded in our law."<sup>219</sup>

In *People v. Dillon*, the California Supreme Court reaffirmed the first-degree felony-murder rule.<sup>220</sup> The holding suggested that the legislature reconsider the subject of first-degree and second-degree felony-murder doctrine.<sup>221</sup> In *Burroughs*, the court referred to the *Dillon* decision and suggested that although the issue regarding the continued "vitality" of the second-degree felony-murder rule was at stake in neither *Dillon* nor *Burroughs*, they would review the rule if it were raised for review.<sup>222</sup> However, the court rescinded its invitation when it heard the *Patterson* case, declining the defendant's invitation to determine the continued vitality of the rule.<sup>223</sup>

At one point, the California Supreme Court seemed inclined to review the validity of the second-degree felony-murder doctrine and to abrogate it. However, the *Patterson* court's refusal to review the doctrine reveals the California Supreme Court's reluctance to further limit the felony-murder doctrine. The felony-murder doctrine is firmly rooted within California law and it is unlikely that this doctrine will undergo many further changes without legislative action.

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murders other than those specified as first-degree murders are murders of the second-degree." DALTON & KNIGHTEN, *supra* note 3, § 5.6[A].

218. *Washington*, 62 Cal. 2d at 783, 402 P.2d at 134, 44 Cal. Rptr. at 446; *see also Burroughs*, 35 Cal. 3d at 829, 768 P.2d at 897, 201 Cal. Rptr. at 322; *Henderson*, 19 Cal. 3d at 92, 560 P.2d at 1183, 137 Cal. Rptr. at 4;. Indeed, the Model Penal Code has eliminated the "strict liability aspects of the traditional felony-murder doctrine but at the same time recogniz[ed] the probative significance of the concurrence of homicide and a violent felony."

219. *People v. Phillips*, 64 Cal. 2d 574, 582, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232 (1966) (overruled on other grounds by *Flood*, 18 Cal. 4th at 490 n.12, 957 P.2d at 882 n.12, 76 Cal. Rptr. 2d at 193 n.12).

220. 34 Cal. 3d at 472, 668 P.2d at 715, 194 Cal. Rptr. at 408 (1983).

221. *See id.* at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19.

222. *See Burroughs*, 35 Cal. 3d at 829 n.3, 768 P.2d at 897 n.3, 201 Cal. Rptr. at 322 n.3.

223. *See Patterson*, 49 Cal. 3d at 621, 778 P.2d at 554, 262 Cal. Rptr. at 200.

#### D. Agency and Proximate Cause in Felony-Murder

The most difficult part of felony-murder is determining how far liability should extend under the doctrine.<sup>224</sup> Should liability be imposed upon a defendant whose co-felon does the actual killing? What if a bystander commits the killing? Should a defendant be liable when the person killed is a co-felon, or is a co-felon's death of too little concern to impose liability at all? Because no intent to kill is required before imposing liability under felony-murder, the element of causation is paramount.<sup>225</sup> This reliance on causation has made answering the previous questions critical, but at the same time exceedingly difficult.

This Section examines the agency doctrine within the context of felony-murder. It begins by defining "agency" and explaining its role within felony-murder in California homicide law. Sub-section one examines the role of the felony-murder doctrine in killings by a co-felon, and sub-section two examines the role of the felony-murder doctrine in killings by a third party, such as the victim.

Historically, courts have used the agency theory<sup>226</sup> as a way of establishing causation.<sup>227</sup> Originally, this doctrine was borrowed from the conspiracy doctrine.<sup>228</sup> When courts first applied the

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224. See Michelle S. Simon, *Whose Crime Is It Anyway?: Liability for the Lethal Acts of Nonparticipants in the Felony*, 71 U. DET. MERCY L. REV. 223, 224 (1994).

225. *Id.*

226. Agency is a fiduciary relation established when one person acts on behalf of another. An example of the agency theory appears in *Commonwealth v. Campbell*, 89 Mass. 541 (1863). The defendant was involved in a riot, and the court considered whether the defendant could be guilty of felony-murder when another person was killed by a soldier who was resisting the riot's attack. *Id.* at 542-46. In defining the scope of agency within felony-murder, the court held that "a person engaged in the commission of an unlawful act is legally responsible for all of the consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others to accomplish an illegal purpose, he is liable . . . for the acts of each and all who participate with him . . ." *Id.* at 543-44.

227. For a discussion of causation, see *supra* Part V.

228. See Simon, *supra* note 224, at 226-34. In the conspiracy doctrine, a co-conspirator's liability is limited to only those acts that are committed in furtherance of the conspiracy. They are not responsible for any acts that were committed outside of those planned by the conspirators. These outside acts were seen as destroying the agency relationship between the parties, severing vicarious liability.

conspiracy doctrine, liability was limited to those situations that involved a killing in furtherance of the felony.<sup>229</sup> As such, if a bystander did the killing, no liability would be imposed because the killing did not further the purpose of the felons in the commission of the crime.<sup>230</sup> Therefore, the identity of the killer became the threshold issue for liability under the felony-murder doctrine, and the killer's identity moved to the forefront in importance.<sup>231</sup>

This theory of agency has been used by a majority of the states.<sup>232</sup> However, recently courts have begun moving towards a proximate-cause theory of liability.<sup>233</sup> This approach shifts the threshold issue to whether the killing was a foreseeable result of the commission of the felony.<sup>234</sup> This theory appears to have been borrowed from tort law, where a defendant may be liable if the injury suffered by the plaintiff was foreseeable.<sup>235</sup> However, the defendant would not be liable if there was an intervening event that broke the chain of causation.<sup>236</sup>

California goes one step further by requiring only a causal relationship. In *People v. Stamp*, the court imposed felony-murder liability noting that "[t]he doctrine is not limited to those deaths which are foreseeable."<sup>237</sup> Rather, the conviction rested on the direct causal relationship between the felony and the murder.<sup>238</sup> In *Stamp*, the victim died of a heart attack shortly after the defendants committed a robbery.<sup>239</sup> On appeal, the defendants argued that the felony-murder doctrine should not have been applied because the killing had not occurred in perpetration of the felony.<sup>240</sup> Rather, the

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229. *See id.*

230. *See id.* Indeed, if a bystander did the killing, it often is in resistance of the felony, and not in furtherance of it.

231. *See* KADISH & SCHULHOFER, *supra* note 2, at 472-80.

232. *See* State v. Branson, 487 N.W. 2d 880 (Minn. 1992); State v. Bonner, 411 S.E. 2d 598 (N.C. 1992); State v. Hoang, 755 P.2d 7 (Kan. 1988).

233. *See* KADISH & SHULHOFER, *supra* note 2, at 471-72.

234. *See id.*

235. *See* Simon, *supra* note 224. *See generally*, Note, *Felony-murder: A Tort Law Reconceptualization*, 99 HARV. L. REV. 1918, 1918-20 (1986) (comparing the felony-murder rule to tort law).

236. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 42, 43 (5th ed. 1984).

237. 2 Cal. App. 3d 203, 210, 82 Cal. Rptr. 598, 603 (1969).

238. *See id.* at 209, 82 Cal. Rptr. at 601.

239. *See id.* at 207, 82 Cal. Rptr. at 600.

240. *See id.*

killing was perpetrated after the robbery had already occurred. The California Court of Appeal disagreed and held that the felony-murder doctrine was not limited to foreseeable deaths. The felony-murder rule would apply as long as the killing was a "direct causal result" of the felony.<sup>241</sup>

### 1. Agency: killings by a co-defendant

The felony-murder rule is invoked when a defendant kills another during the perpetration of a felony.<sup>242</sup> However, problems arise when a co-felon commits the murder. How far should liability extend? This has led to the development of agency within the context of felony-murder.

California courts have repeatedly held that all co-felons involved in the commission of a crime are equally responsible for a murder that is committed by one of them during the perpetration of the felony.<sup>243</sup> This approach appears to have been first adopted by the California courts in *People v. Vasquez*.<sup>244</sup> There, a man had been shot to death during the robbery of a store.<sup>245</sup> Vasquez admitted to being involved in the robbery but testified that another robber had fired the shot without his approval.<sup>246</sup> Vasquez appealed his conviction, but the court held him responsible for the homicides committed by his associates because they were "in furtherance of the common purpose . . . of the robbery."<sup>247</sup>

Shortly after *Vasquez*, in the similar case of *People v. Olsen*, the court held that "[i]f a number of persons conspire together to commit a felony, and take the life of another person . . . it is murder in all, although only one may have inflicted the fatal blow."<sup>248</sup>

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241. *See id.* at 210, 82 Cal. Rptr. at 603.

242. *See supra*, Part VI.B.

243. *See* *People v. Gilbert*, 22 Cal. 2d 522, 140 P.2d 9 (1943); *People v. Martin*, 12 Cal. 2d 466, 85 P.2d 880 (1938); *People v. Boss*, 210 Cal. 245, 290 P. 881 (1930); *People v. Perry*, 195 Cal. 623, 234 P. 890 (1925).

244. 49 Cal. 560 (1875); *see also* *People v. Smithson*, 79 Cal. App. 4th 480, 94 Cal. Rptr. 2d 170 (2000) (holding that a defendant, if his accomplice in the robbery killed his victim by accident, should be convicted of first-degree murder).

245. *See Vasquez*, 49 Cal. 560–61 (1875).

246. *See id.*

247. *Id.* at 562.

248. 80 Cal. 122, 124, 22 P. 125, 126 (1889).

This doctrine continues to be followed by the California courts. Indeed, the California Supreme Court highlighted the deep entrenchment of agency within the felony-murder doctrine in *People v. Martin*.<sup>249</sup> There, the defendant appealed his murder conviction, claiming that although he did drive his co-felon to the scene of the crime, he should not be held responsible for the murder because he did not assist his co-felon in the commission of the murder.<sup>250</sup> The California Supreme Court denied his appeal stating:

It is, of course, *the well-settled law in California* that if a human being is killed by any one of several persons jointly engaged at the time of such killing in the perpetration of or an attempt to perpetrate the crime of robbery, whether such killing is intentional or unintentional, or accidental, each and all of such persons so jointly engaged in the perpetration of, or attempt to perpetrate such crime of robbery, are guilty of murder of the first-degree.<sup>251</sup>

Thus, the agency doctrine had become a deeply-rooted, integral part of California felony-murder law.<sup>252</sup>

*a. in furtherance requirement*

The California courts have been inconclusive about the scope of complicity required to impose liability. This has resulted in two conflicting formulations of the scope of the felony-murder rule when applied to killings committed by co-felons. One line of cases—sometimes referred to as the *Vasquez* approach—takes the view that the killing by a co-felon must be “in furtherance of the common purpose.”<sup>253</sup> This is consistent with language from the California Supreme Court’s earlier cases, such as *Vasquez* and *Olsen*.<sup>254</sup> However, the other line of cases takes a broader view, simply requiring the killer and the accomplice to be jointly engaged in a

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249. 12 Cal. 2d 466, 85 P.2d 880 (1938).

250. *See id.* at 472, 85 P.2d at 883–84.

251. *Id.* (emphasis added).

252. *See People v. Washington*, 62 Cal. 2d 777, 782, 402 P.2d 130, 133 (1965).

253. *Vasquez*, 49 Cal. at 560; *see also Olsen*, 80 Cal. at 122, 22 P. at 125; *Washington*, 62 Cal. 2d at 777, 402 P.2d at 130 (holding that liability for felony-murder requires a killing by a co-felon that is in furtherance of the common purpose).

254. *See Vasquez*, 49 Cal. at 560; *Olsen*, 80 Cal. at 122, 22 P. at 125.

felony at the time of the killing.<sup>255</sup> This approach was adopted by the California Supreme Court in *People v. Perry*.<sup>256</sup>

In *Perry*, the defendant was tried and convicted of robbery and felony-murder.<sup>257</sup> On appeal, the defendant challenged the instructions given to the jury.<sup>258</sup> The court denied his appeal, stating that it was not error to instruct the jury that "if a human being is killed by any one of several persons jointly engaged at the time of such killing in the perpetration of [a felony], whether such killing is intentional or unintentional . . . all . . . engaged in the perpetration of [the felony], are guilty of murder of the first degree."<sup>259</sup> This instruction did not include an "in furtherance" clause, even though the court acknowledged that other cases had included such language.<sup>260</sup> The language used by this court was adopted in other cases,<sup>261</sup> resulting in a divergent approach to the scope of complicity.<sup>262</sup> This caused confusion about the requirements for imposing felony-murder on co-felons who did not commit the killing.

The California Court of Appeal attempted to reconcile the two complicity rules in *People v. Cabalero*.<sup>263</sup> There, the defendant was participating in a robbery when one of his co-felons, Dasalla, killed a third member of the group out of anger.<sup>264</sup> On appeal, the defendants argued that they could not be held liable for the killing committed by Dasalla because the killing had not been committed in furtherance of

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255. See *People v. Perry*, 195 Cal. 623, 234 P. 890 (1925); see also *People v. Martin*, 12 Cal. 2d 466, 85 P.2d 880 (1938) (requiring the killer and the accomplice to be jointly engaged in the felony at the time of killing).

256. See *Perry*, 195 Cal. at 633, 234 P. at 894.

257. See *id.* at 626, 234 P. at 891.

258. See *id.* at 637-38, 234 P. at 896.

259. *Id.*

260. See *id.*

261. See generally *People v. Witt*, 170 Cal. 104, 148 P. 928 (1915) (finding that any killing in furtherance of a felony is first-degree murder); *People v. Raber*, 168 Cal. 316, 143 P. 317 (1914) (stating that a killing done in perpetration of robbery is murder); *People v. Milton*, 145 Cal. 169, 173, 78 P. 549, 554 (1904) (holding that omitting the words "without any design to effect death" from the felony-murder statute makes "any killing, while engaged in the perpetration of a felony, murder in the first-degree").

262. See *Perry*, 195 Cal. at 623, 234 P. at 890; *Washington*, 62 Cal. 2d at 777, 402 P.2d at 130.

263. 31 Cal. App. 2d 52, 87 P.2d 364 (1939).

264. See *id.* at 54, 87 P.2d at 365.

the felony.<sup>265</sup> The court acknowledged that there was indeed a line of cases suggesting that the defendants could not be held liable for killings not in furtherance of the felony.<sup>266</sup> Nonetheless, the court upheld the defendant's conviction, stating that the *Perry* line of cases allowed for the imposition of the felony-murder rule when the killing occurred *during* the commission of the felony.<sup>267</sup>

The court was attempting to reconcile the two approaches into one cohesive rule.<sup>268</sup> Even though this rule has encountered a great deal of criticism from commentators, it remains good law.<sup>269</sup> The critics of the rule charge that it removes the causal requirement from felony-murder and replaces it with "mere coincidence of time and place."<sup>270</sup> Commentators argue that the rule is too broad.<sup>271</sup> It is easy to think of a situation where two conspirators, Felon A and Felon B, are committing a felony and while committing the felony, Felon A sees his girlfriend on a date with another man. He shoots them both out of rage. Applying the *Cabaltero* rationale, Felon B would be liable under the felony-murder rule because the killing occurred *during* the commission of a felony, despite a lack of causal relationship between his activities and the killing of the victims.<sup>272</sup> The *Cabaltero* approach has resulted in a further widening of the scope of complicity that allows for the application of the felony-murder doctrine.

*b. defendant joins co-felon after killing occurred*

Although a felon is liable for killings committed by co-felons during the commission of a crime, it was not clear whether liability extended to co-felons who joined the felonious enterprise after the

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265. See *id.* at 60–61, 87 P.2d at 368.

266. See *id.*

267. See *id.* at 61–62, 87 P.2d at 368–69.

268. See *id.*

269. See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW (2nd ed. 1986) (criticizing the felony-murder doctrine as substituting the "mere coincidence of time and place" for what should be a required causal relationship between planned felony and killing). There has been a lot of criticism of the felony-murder rule in general. However, a detailed discussion of this criticism and its merits is beyond the scope of this article.

270. *Id.* § 7.5.

271. See *id.*

272. See *Cabaltero*, 31 Cal. App. 2d at 52, 87 P.2d at 364.

killing had already occurred.<sup>273</sup> This problem recently presented itself to the court in *People v. Pulido*.<sup>274</sup>

In *Pulido*, a cashier at a gas station was shot in the head during a robbery.<sup>275</sup> The defendant, Pulido, claimed that it was his uncle, Aragon who had committed the murder.<sup>276</sup> Pulido testified that on the night of the murder he and his uncle had been driving and his uncle stopped at a gas station to buy cigarettes.<sup>277</sup> Pulido claimed to have heard gunshots, and when he ran into the gas station, he found the clerk dead.<sup>278</sup> When he ran back to his car, his uncle followed him with the entire cash register.<sup>279</sup> He then alleged that his uncle forced him to open the cash register and take the money inside.<sup>280</sup> Despite Pulido's claims, the jury convicted him of robbery and felony-murder, but they could not decide if he in fact killed the clerk.<sup>281</sup>

On appeal, Pulido argued that the court committed reversible error by failing to instruct the jury that in order to find him liable under felony-murder, they would have to find that he joined in the robbery before the killing occurred.<sup>282</sup> The court held that under both the *Vasquez* and *Perry* approach, an accomplice is not liable for a killing that preceded any intent to engage in a felony.<sup>283</sup>

Looking first at the *Vasquez* approach to the scope of accomplice liability for felony-murder, the court noted that liability under felony-murder only attaches to killings that are committed in

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273. Depending on the court, the defendant may only be liable if the killing was committed in furtherance of the felony. See *supra*, Part VI.D.1.a for a more detailed discussion of this conflict.

274. 15 Cal. 4th 713, 936 P.2d 1235, 63 Cal. Rptr. 2d 625 (1997).

275. See *id.* at 717, 936 P.2d at 1237, 63 Cal. Rptr. 2d at 627.

276. See *id.*

277. See *id.* at 718, 936 P.2d at 1237–38, 63 Cal. Rptr. 2d at 627–28.

278. See *id.*

279. See *id.*

280. See *id.*

281. See *id.* at 719, 936 P.2d at 1238, 63 Cal. Rptr. 2d at 628.

282. See *id.* at 726, 936 P.2d at 1243, 63 Cal. Rptr. 2d at 633.

283. See *id.* at 721–22, 936 P.2d at 1239–40, 63 Cal. Rptr. 2d at 629–30.

Although the court held that an accomplice was not liable for a killing that occurred before the accomplice joined the felonious enterprise, it nonetheless upheld the defendant's conviction because the trial court remedied the error in a instruction.



furtherance of a common purpose.<sup>284</sup> Because the killing occurred before the defendant had joined in the felonious purpose, it could not have been committed to further that purpose.<sup>285</sup> Furthermore, under the *Perry* approach, liability would not attach because "the killer and accomplice were not 'jointly engaged at the time of such killing' in [a felony]."<sup>286</sup> Therefore, neither the *Vasquez* nor the *Perry* approach encompassed killings that occurred before joining the felonious enterprise.<sup>287</sup>

The court also pointed to the purpose behind the felony-murder rule as justification for its decision.<sup>288</sup> The court believed that extension of felony-murder complicity to felons who join after the killing has occurred would violate the court's prior holding that "conspirators are not liable for substantive crimes committed before their entry into the conspiracy."<sup>289</sup> Furthermore, the court believed that extending the rule would not further its deterrent function.<sup>290</sup> It reasoned that if the purpose of the felony-murder doctrine was to deter negligent or accidental killings during the commission of a felony, then "punishing late joiners for earlier homicides committed by others [would] not deter the negligent or accidental commission of such homicides" because the late joiners would have no way of preventing the killing.<sup>291</sup> Although imposing liability would deter joining such enterprises, the court believed that the punishment that would be imposed would not be proportional to the crime, especially because the killing was not causally related to the acts of the co-felon.<sup>292</sup>

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284. *See id.*; *Vasquez*, 49 Cal. at 560; *Olsen*, 80 Cal. at 122, 22 P. at 125; *Washington*, 62 Cal. 2d at 777, 402 P.2d at 133.

285. *See Pulido*, 15 Cal. 4th at 721-22, 936 P.2d at 1239-40, 63 Cal. Rptr. 2d at 629-30.

286. *Id.* at 722, 936 P.2d at 1241, 63 Cal. Rptr. 2d at 631.

287. *See id.*

288. *See id.* at 724-25, 936 P.2d at 1241-42, 63 Cal. Rptr. 2d at 632-33.

289. *Id.* at 725, 936 P.2d at 1242; *see also* *People v. Weiss*, Cal. 2d 535, 564-65, 327 P.2d 527, 544-45 (1958) (explaining that one who joins a conspiracy after its formation adopts the previous acts and declarations of the other conspirators).

290. *See Pulido*, 15 Cal. 4th at 725, 936 P.2d at 1242-43, 63 Cal. Rptr. 2d at 633.

291. *Id.*

292. *See id.*

*c. co-felon kills a felon*

Typically, it is the killing of a victim of the felony that results in prosecution under the felony-murder doctrine. However, there are situations where the killing is of a co-felon, by a felon. Situations where a co-felon has been killed by his accomplice have stirred much debate about whether the felony-murder doctrine should apply.<sup>293</sup> This debate has resulted in a split among jurisdictions.<sup>294</sup> California has decided to impose liability under the felony-murder doctrine.<sup>295</sup>

Imposition of liability for the killing of a co-felon by an accomplice first occurred in *People v. Cabalero*.<sup>296</sup> As discussed above, Dasalla, one of the defendant's co-felons, killed a third member of the group out of anger.<sup>297</sup> On appeal, the defendant argued both that the killing did not meet the requirements of felony-murder, and that the issue of whether it was accidental or intentional should have been submitted to the jury.<sup>298</sup> The court turned to the specific language of prior cases defining the scope of felony-murder, which held that *any killing* committed by a co-felon in furtherance of the felony establishes liability.<sup>299</sup> The court acknowledged that although there were no cases directly on point, the "language employed in the decisions . . . makes it clear that said section [189] was designed to include . . . any killing by one engaged in the commission of any of the specified felonies, regardless of the status of the person killed."<sup>300</sup>

The defendants attempted to bolster their position by pointing to *People v. Ferlin*.<sup>301</sup> There, the defendant conspired with another to burn his leased premises for insurance money.<sup>302</sup> During the

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293. See Lawrence Newman & Lawrence Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. CAL. L. REV. 313, 357-62 (1957).

294. See *id.*

295. See *People v. Cabalero*, 31 Cal. App. 2d 52, 58, 87 P.2d 364, 367 (1939).

296. *Id.* at 52, 87 P.2d at 364.

297. See *id.* at 56, 87 P.2d at 366.

298. See *id.* The court argued that the killing was governed by Cal. Penal Code § 187 and not § 189. Therefore, if the jury found that the co-felon was shot accidentally, he must be acquitted.

299. See *id.* at 58, 87 P.2d at 367.

300. *Id.*

301. 203 Cal. 587, 265 P.2d 230 (1928).

302. See *id.* at 589, 265 P.2d at 231-32.

perpetration of the felony, a co-conspirator accidentally burned himself to death.<sup>303</sup> The jury convicted the defendant of felony-murder, but the California Supreme Court reversed, holding that the defendant was not liable under the felony-murder doctrine because the co-felon killed himself.<sup>304</sup> However, the *Cabaltero* court was quick to distinguish the case.<sup>305</sup> It noted that in *Ferlin*, the co-felon killed himself, but in *Cabaltero* the co-felon was killed by *another* co-felon.<sup>306</sup> This distinction is what allowed for the imposition of the felony-murder rule under California Penal Code section 189.<sup>307</sup>

## 2. Killings by a victim or police officer

Courts have had difficulty applying the felony-murder doctrine in a variety of situations. However, one of the most difficult situations for the courts to sort out involves applying the felony-murder doctrine to killings perpetrated by third parties rather than accomplices of the defendant.<sup>308</sup>

When this issue first arose, the California courts appeared to treat it as an issue of causation, which led to the development and application of proximate cause theories of liability.<sup>309</sup> One of the earliest applications of this approach can be found in *People v. Harrison*.<sup>310</sup>

In *Harrison*, three men went into a store with the intent to rob it.<sup>311</sup> While doing so, an employee of the store grabbed a gun and began shooting at the defendants.<sup>312</sup> In the process, he ended up killing his employer who was also in the store.<sup>313</sup> The defendants were charged and convicted of robbery and felony-murder.<sup>314</sup> They appealed their conviction, arguing that because a co-felon had not

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303. *See id.*

304. *See id.* at 596–98, 265 P.2d at 234–35.

305. *See Cabaltero*, 31 Cal. App. 2d at 59–60, 87 P.2d at 368.

306. *See id.*

307. *See id.*

308. *See* WHARTON'S CRIMINAL LAW § 69 (1998).

309. *See People v. Harrison*, 176 Cal. App. 2d 330, 334–35, 1 Cal. Rptr. 414, 417–18 (1959).

310. *See id.* at 345, 1 Cal. Rptr. at 425.

311. *See id.* at 331, 1 Cal. Rptr. at 415–416.

312. *See id.*

313. *See id.*

314. *See id.*

committed the killing, the felony-murder rule did not apply.<sup>315</sup> The court noted that at the time the case arose, there were no California cases on point.<sup>316</sup> Accordingly, the court turned to an examination of decisions reached by other states,<sup>317</sup> as well as an examination of tort law.<sup>318</sup> Ultimately, the court decided to follow the lead set by cases such as *Commonwealth v. Almeida* and *People v. Podlski* and applied tort principles of proximate cause.<sup>319</sup> The court stated that when the co-felons should reasonably foresee the likelihood of a killing by a non-participant during the commission of a felony, the co-felons are liable for the killing as if they committed it.<sup>320</sup> The court stated that given the purposes of the felony-murder rule, there is no reason to differentiate between killings by a third party or by a co-felon.<sup>321</sup> "The killing was murder and it was committed in the perpetration of attempted robbery . . . ."<sup>322</sup> Therefore, because the defendants put in motion a chain of events that they should have foreseen, they are liable for the death of the victim, even though he was shot by a third party.<sup>323</sup>

However, a few years later in *People v. Washington*, the court revisited this issue and clarified the scope of its prior holding.<sup>324</sup> In *Washington*, the defendant and a co-felon robbed a gas station.<sup>325</sup> The owner of the gas station pulled out a revolver and shot the co-felon, killing him.<sup>326</sup> The defendant was convicted of both robbery and felony-murder.<sup>327</sup> He appealed the conviction, arguing that the rule of *Harrison* should be limited only to those situations where an innocent bystander is killed, and that it should not include cases

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315. See *id.* at 331–32, 1 Cal. Rptr. at 416.

316. See *id.* at 332, 1 Cal. Rptr. at 416.

317. The court primarily examined *Commonwealth v. Almeida*, 68 A.2d 595 (Pa. 1949) (overruled in part by *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218 (1970)) and *People v. Podolski*, 52 N.W. 2d 201 (Mich. 1952). Both held that felons who provoke gunfire are guilty of first-degree murder even though the lethal bullet was fired by a third party.

318. *Harrison*, 176 Cal. App. at 343–44, 1 Cal. Rptr. at 424–25.

319. See *id.* at 345, 1 Cal. Rptr. at 425.

320. See *id.*

321. See *id.*

322. *Id.*

323. See *id.*

324. 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

325. See *id.* at 779, 402 P.2d at 132, 44 Cal. Rptr. at 444.

326. See *id.*

327. See *id.* at 779–780, 402 P.2d at 132–33, 44 Cal. Rptr. at 445.

where their accomplices are killed.<sup>328</sup> The court rejected this distinction because it “would make the defendant’s criminal liability turn upon the marksmanship of victims and policemen. A rule of law cannot reasonably be based on such a fortuitous circumstance.”<sup>329</sup> However, the court reconsidered *Harrison* in light of the purposes of the felony-murder rule.<sup>330</sup>

The court began by examining the function of the felony-murder doctrine.<sup>331</sup> California Penal Code section 189 ascribes malice aforethought to a felon who kills in the perpetration of a felony, allowing a jury to convict him of murder.<sup>332</sup> However, the court noted that when a killing is not committed by the felon, but rather by a third party, malice aforethought cannot be attributed to the felon because the killing was not committed in perpetration of the felony.<sup>333</sup> Although *Harrison* attempted to attribute malice through the use of proximate cause, the court determined that this was not enough to meet the requirements of section 189.<sup>334</sup> In examining the facts of *Washington*, the court noted that, “the killing was committed to thwart a felony. To include such killings within Section 189 [sic] would expand the meaning of the words ‘murder . . . which is committed in the perpetration . . . [of] robbery . . .’ beyond common understanding.”<sup>335</sup> However, even though the court refused to apply the felony-murder rule in such circumstances, the decision does not preclude the state from attempting to attach liability through other theories of liability.<sup>336</sup> Indeed, the court itself suggested that the defendant could still be found liable for the murder through doctrines such as vicarious liability and recklessness.<sup>337</sup>

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328. *See id.* The broad rule in *Harrison* was based on decisions from Pennsylvania and Michigan. Ironically, both states have already limited the doctrine by holding that felons are not liable under felony-murder if a third party killed their accomplice.

329. *Id.* at 780, 402 P.2d at 132, 44 Cal. Rptr. at 444.

330. *See id.* at 781–84, 402 P.2d at 133–35, 44 Cal. Rptr. at 446.

331. *See id.*

332. *See id.* For a more detailed discussion of the relationship between the elements of murder and felony-murder, see *supra* Part VI.B.

333. *See id.*

334. *See id.*

335. *Id.* at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.

336. *See id.*

337. *See id.* An in-depth discussion of vicarious liability and recklessness is beyond the scope of this paper.

*E. Conclusion*

The felony-murder rule continues to be met with a great deal of criticism. The removal of the intent requirement seems to be the most troubling aspect of this rule, especially when it creates the possibility that defendants may become liable for unforeseeable killings by third parties. Despite these concerns, the felony-murder rule continues to be enforced in California, although the scope of the rule is in flux.

## VII. ACCOMPLICE LIABILITY: DERIVATIVE RESPONSIBILITY\*

This Part examines the accomplice liability<sup>1</sup> doctrine in California criminal law, specifically in relation to murder. This is a difficult area of criminal law, which consists of islands of light in a sea of darkness. This Part explains the statutory requirements of accomplice liability and examines the current state of the law in California criminal law. Section A turns to a close examination of the nature of both the aiding and abetting requirements as well as the “natural and probable consequences” doctrine within California. Section C consists of an examination of the relationship required between an accomplice and a primary perpetrator in order to find liability.

Section 31 of the California Penal Code states that “[a]ll persons . . . [who] aid *and* abet in [the] commission [of a crime] . . . are principals in any crime so committed.”<sup>2</sup> Prior to the enactment of this statute, common law made an aider *or* abettor a principal to the crime in the second degree.<sup>3</sup> Furthermore, the common law both prohibited the aider or abettor from being brought to trial until the principal who committed the crime had been convicted, and required

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\* Larry M. Lawrence, II: J.D. Candidate, May 2004, Loyola Law School; B.A., Political Science, University of California, Los Angeles. For making me smile, a special thank you to Ted Biaselli. Ted, your wonderful encouragement and support has made this possible. I would also like to thank Amir Afsarzadeh for his unique input and insight.

1. Throughout this paper, I use the terms “accomplice liability” and “aiding and abetting” interchangeably. Although perhaps conceptually distinctive, in that “accomplice liability” encompasses a wider range of liability, these terms are frequently used interchangeably by the courts, so I will do the same.

2. CAL. PENAL CODE § 31 (West 2001).

3. See *People v. Coffey*, 161 Cal. 433, 439, 119 P. 901, 903 (1911); see also *People v. Butts*, 236 Cal. App. 2d 817, 46 Cal. Rptr. 362 (1965); *People v. Collum*, 122 Cal. 186, 54 P. 589 (1898) (rejecting from the category of accomplices the accessory after the fact). Second-degree murder does not require premeditation; however, it does require “malice aforethought.” For a further explanation of second-degree murder see *supra* Parts III and IV. A further discussion of the evolution of common law rules to the current statutory code is beyond the scope of this Developments piece and unfortunately not a topic discussed in this Part.

a separate charge of complicity.<sup>4</sup> California Penal Code section 31 has effectively done away with the common law rule, thereby simplifying California criminal law by combining all principals into one category without reference to degrees.<sup>5</sup> As the California Supreme Court recently stated, "The aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own. It obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role."<sup>6</sup>

### A. *Accomplice Liability Defined*

The doctrine of accomplice liability makes those who aid and abet in the commission of a crime liable as a principal for the actions of their accomplices.<sup>7</sup> This is a form of derivative liability—a method of deriving criminal liability based upon the commission of a criminal offense by another person.<sup>8</sup> Because it is derivative, criminal liability depends entirely upon the crime that the actual perpetrator commits.<sup>9</sup> Accomplice liability is, therefore, not

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4. See *Coffey*, 161 Cal. at 437–40, 119 P. at 903–04.

5. See CAL. PENAL CODE § 31.

6. *People v. McCoy*, 25 Cal. 4th 1111, 1120, 24 P.3d 1210, 1216, 108 Cal. Rptr. 2d 188, 195 (2001).

7. See *id.*; *People v. Francisco*, 22 Cal. App. 4th 1180, 27 Cal. Rptr. 2d 695 (1994) (holding that an aider and abettor is liable as a principal if the act committed by the primary perpetrator is reasonably foreseeable).

8. See *Francisco*, 22 Cal. App. 4th at 1190, 27 Cal. Rptr. 2d at 700–01; see also *People v. Brigham*, 216 Cal. App. 3d 1039, 265 Cal. Rptr. 486 (1989) (holding that the appellant's derivative criminal liability as an aider and abettor for his partner's crime existed even though the crime was unintended by the appellant).

9. See *People v. McCoy*, 79 Cal. App. 4th 67, 82, 93 Cal. Rptr. 2d 827, 838. It is important to note that accomplice liability is not a form of vicarious liability. Under the doctrine of vicarious liability, the defendant is held responsible for the actions of another based *solely* on the relationship between the two parties. The defendant's guilt is found, not because of any conduct that they have engaged in, but instead vicariously through the actual perpetrator. See *McCoy*, 79 Cal. App. 4th. at 84, 93 Cal. Rptr. 2d at 839. Rather, under the aiding and abetting doctrine, the liability of the accomplice is derived based on their willful and culpable conduct in helping the perpetrator violate the law. See *id.* This distinction becomes more apparent in discussing the liability of an accomplice for a lesser crime than that committed by the perpetrator.



considered a separate criminal offense. It is an alternate form of finding liability for the charged offense.<sup>10</sup>

The statutory term “aid and abet” is a legal term of art not commonly used, nor even understood by lay persons. It represents a legal theory under which one may be held derivatively liable as a principal for the criminal acts of another if two elements are met. Each element, aiding and abetting, performs a function necessary to justify the imposition of criminal liability.

The “aiding” element requires some conduct by the accomplice that results in the accomplice becoming involved in the commission of a crime.<sup>11</sup> The typical way in which a party becomes involved in the commission of a crime is through the assistance, promotion, encouragement, or instigation of criminal action.<sup>12</sup> Once a party becomes involved in the commission of a crime, the aiding element has been met, no matter how slight the assistance. The law establishes no degree requirement to the amount of involvement required to fix liability as a principal.<sup>13</sup>

The second element, “abetting,” serves to supply the mental state necessary to justify the imposition of criminal liability.<sup>14</sup> This requirement looks for a criminal state of mind—specifically, it requires that the accomplice has both knowledge of the perpetrator’s unlawful purpose to commit a crime, and the intent to facilitate the perpetrator’s unlawful purpose.<sup>15</sup>

Thus, as in most criminal conduct, accomplice liability involves both an *actus reus* (the actual aiding) and a *mens rea* (the intent to facilitate the criminal purpose of the perpetrator).<sup>16</sup>

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10. See *Francisco*, 22 Cal. App. 4th at 1190, 27 Cal. Rptr. 2d at 700–01; *Brigham*, 216 Cal. App. 3d at 1039, 265 Cal. Rptr. at 486.

11. See *People v. Croy*, 41 Cal. 3d 1, 11, 710 P.2d 392, 397–98, 221 Cal. Rptr. 592, 597–98 (1985); see also *People v. Nguyen*, 21 Cal. App. 4th 518, 530, 26 Cal. Rptr. 2d 323, 330–31 (1993) (holding that sexual offenses could be reasonably foreseeable consequences of robbery for purposes of aiding and abetting).

12. See CAL. PENAL CODE § 31 (West 2001).

13. See CAL. PENAL CODE § 31; *Nguyen*, 21 Cal. App. 4th at 529, 26 Cal. Rptr. 2d at 329–30.

14. See CAL. PENAL CODE § 31.

15. See *People v. Campbell*, 25 Cal. App. 4th 402, 413–14, 30 Cal. Rptr. 2d 525, 532 (1994).

16. See *id.*, *People v. Fredoni*, 12 Cal. App. 685, 108 P. 663 (1910).

### 1. Aiding

Accomplice liability is a charge brought against someone who actually engages in the assistance of the commission of a crime.<sup>17</sup> Aiding is frequently thought of as assisting in the commission of the criminal offense, helping to supplement the efforts of another, or assisting the perpetrator's acts.<sup>18</sup> As such, if someone were to stand by and watch a rape occur, but not aid the commission of the crime or facilitate its occurrence out of fear, that person would not be held derivatively liable as an accomplice because they did not act affirmatively.<sup>19</sup> Although this omission may be morally reprehensible, it is not a legal basis for criminal liability. Accomplice liability requires an affirmative act—aiding. Otherwise, accomplices may be punished for nothing more than bad thoughts.<sup>20</sup>

Traditionally, when looking for an *actus reus*, courts require both actual and proximate cause.<sup>21</sup> When looking for actual cause, the traditional test used is the “but-for” test.<sup>22</sup> However, this test

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17. See CAL. PENAL CODE § 31; see generally *People v. Dole*, 122 Cal. 486, 55 P. 581 (1898) (holding that a person may aid and abet a crime innocently as in forgery); *People v. Etie*, 119 Cal. App. 2d 23, 258 P.2d 1069 (1953) (requiring aid before imposing accomplice liability).

18. See *Dole*, 122 Cal. at 486, 55 P. at 581; *Etie*, 119 Cal. App. 2d at 28, 258 P.2d at 1072. It is important to understand that the aiding element does not require any knowledge that the aid rendered was in support of a criminal act. This element is solely concerned with the accomplice's actions.

19. See *People v. Hill*, 77 Cal. App. 2d 287, 294, 175 P.2d 45, 49 (1946) (holding that the presence of the accused at the scene of the crime does not alone establish liability as an abettor). However, it is important to note that factors, such as presence at the scene of the crime, may be circumstances that can be considered by the jury with any other evidence in deciding the guilt or innocence of the accused. See *People v. Villa*, 156 Cal. App. 2d 128, 134, 318 P.2d 828, 833 (1957).

20. The problems associated with having a legal system where we are punished for our thoughts is explored in the recent film *Minority Report*. There, society has developed a way to predict murders, and intervenes to stop them. The film raises questions of human choice and when crimes are committed.

21. Actual cause is a search for a direct link between the perpetrator's actions and the crime, whereas proximate cause examines the nexus between the action and the crime—how closely they are related.

22. See Causation in California Homicide, *supra* Part V. Typically the test used when looking for actual cause is: “but-for” the perpetrator's actions, the result would not have occurred.

becomes problematic when applied to accomplice liability. For example, if the accomplice's efforts to aid are somehow thwarted or have a negligible effect on the criminal actor, does this satisfy the causation requirement? Despite a lack of actual cause, courts are frequently willing to hold an accomplice liable, which is seemingly at odds with traditional notions of causation that require both actual and proximate cause.<sup>23</sup>

An example of this can be seen in *People v. Wood*.<sup>24</sup> There, the defendant was convicted of aiding and abetting statutory rape<sup>25</sup> after he rented out his room to a young couple.<sup>26</sup> Normally, one would not think that renting out a room would be considered as having assisted in the commission of a crime. The couple would have likely engaged in sexual intercourse even if the defendant had not rented them the room; yet in *Wood*, the court found that the renting of the room was enough to constitute facilitation.<sup>27</sup> As a result, the court found the defendant liable under a theory of accomplice liability.<sup>28</sup> In situations such as this, courts seem to disregard the normal causation requirements, finding that the mere attempt at offering aid justifies imposing liability.<sup>29</sup>

Another classic example can be found in *State ex rel. Attorney General v. Tally, Judge*.<sup>30</sup> In this case, Ross, the victim, seduced Judge Tally's sister-in-law.<sup>31</sup> As a result, her brothers, the Skeltons, followed Ross to a nearby town to kill him.<sup>32</sup> Ross's relatives learned

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23. For a more detailed discussion, see Causation in California Homicide, *supra* Part V.

24. 56 Cal. App. 431, 205 P. 698 (1922).

25. California defines statutory rape as any sexual intercourse with someone under the age of eighteen who is not the spouse of the perpetrator. CAL. PENAL CODE § 261.5 (West 2001).

26. *Wood*, 56 Cal. App. at 431-33, 205 P. at 698.

27. *See id.*

28. *See id.*

29. *See id.* (the court found the defendant guilty of statutory rape even though it was conceded that he did not have sexual intercourse with the victim).

30. 15 So. 722 (Ala. 1894). Although this is not a California case, it serves to highlight problems associated with applying the "but-for" test of causation to accomplice liability and the traditional ways in which courts deal with the issue.

31. *See id.* at 724.

32. *See id.* at 725.

of this and sent a telegram to warn him.<sup>33</sup> After Judge Tally learned of the telegram, he instructed the operator not to deliver the message to Ross.<sup>34</sup> The Skelton brothers managed to find Ross and kill him.<sup>35</sup>

In finding Judge Tally liable as an accomplice, the court noted that there were problems with the "but-for" test.<sup>36</sup> The murder would likely have occurred with or without Judge Tally's involvement, meaning that there may not have been a causal link between his action and the death of Ross.<sup>37</sup> His actions had a negligible effect on the commission of the crime. However, the court noted that "[i]t is quite sufficient if [his act] . . . facilitated a result that would have transpired without it. It is quite enough if the aid merely renders it easier for the principal actor to accomplish the end intended by him . . . though . . . the end would have been attained without it."<sup>38</sup>

This problem of causation has been eliminated in the Model Penal Code section 2.06(3).<sup>39</sup> The drafters of the Model Penal Code extended liability to an accomplice when they aid *or* attempt to aid in the commission of a crime.<sup>40</sup> Holding a party liable for even an attempt to aid a crime eliminates a line drawing problem. Although California's Penal Code is not this specific, the California courts have adopted an approach similar to that in *Tally*, repeatedly stressing that "[t]he test is whether the accused in any way directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures."<sup>41</sup>

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33. *See id.* at 728.

34. *See id.*

35. *See id.* at 724.

36. *See id.* at 740-41.

37. *See id.*

38. *Id.* at 739.

39. The Model Penal Code is a scholarly collection of penal laws drafted by the American Law Institute. It is meant to be a model for the states to use when drafting, interpreting, and revising their penal codes. Therefore, although not binding on any jurisdiction, courts frequently look to it for guidance.

40. MODEL PENAL CODE § 2.06(3) (Official Draft 1962).

41. *Villa*, 156 Cal. App. 2d at 134, 318 P.2d at 833; *see also Campbell*, 25 Cal. App. 4th at 413-14, 30 Cal. Rptr. 2d at 532 (factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense).

As these cases demonstrate, it is not necessary to establish a  
“*de facto*” ..... 1 ..... 1 ..... 1 ..... 1 ..... 1 ..... 1 ..... 1 ..... 1 ..... 1 ..... 1

abetting instructions made it irrelevant whether appellant had driven away from the scene for the purpose of facilitating the robbery or for some other purpose.”<sup>49</sup>

*a. proving knowledge and intent*

It is often difficult to get into the mind of the accused to determine if the accused actually had knowledge of the primary perpetrator’s criminal intent. Although the defendant does not have the burden of proof, statements by the accused accomplice that he was not aware of a plan to commit a crime is not sufficient to constitute proof that he did not know about the primary perpetrator’s criminal intent.<sup>50</sup> Therefore, California courts allow circumstantial evidence to prove that the accused accomplice had knowledge of the crime.<sup>51</sup>

*b. presence alone does not establish knowledge and intent*

Mere presence at the scene of a crime is not enough to establish that one is an abettor.<sup>52</sup> In *Hill*, the appellant, Hill met the perpetrators of the crime for the first time shortly before the crime took place.<sup>53</sup> After inducing him to drive around and look for girls, the perpetrators asked Hill to park on the street and await their return.<sup>54</sup> He sat in the car, turned off the lights, and went to sleep.<sup>55</sup>

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49. *Id.* at 16, 710 P.2d at 401, 221 Cal. Rptr. at 600. The court noted that there will be many cases where no other possible explanation exists for the defendant’s conduct other than that the defendant acted with an intent to facilitate the crime at issue. In those cases, the court found it would not be reversible error. However, here, the court found that had the jury been properly instructed, it would have been possible for a reasonable juror to believe that the defendant did not act with the purpose of facilitating a robbery and thus, the conviction was reversed. *See id.*

50. *See* *People v. Martin*, 12 Cal. 2d 466, 85 P.2d 880 (1938); *People v. Jagers*, 120 Cal. App. 733, 8 P.2d 206 (1932); *People v. Hall*, 87 Cal. App. 634, 262 P. 50 (1927). Indeed, there would be few convictions if the court were to believe every word that a defendant said.

51. *See generally Martin*, 12 Cal. 2d at 466, 85 P.2d at 880 (allowing the jury to infer knowledge of criminal intent from circumstances such as presence at the scene of the crime and relationship with co-felons).

52. *See Hill*, 77 Cal. App. 2d at 287, 175 P.2d at 45.

53. *See id.* at 290–91, 175 P.2d at 47.

54. *See id.*

55. *See id.*

When the primary perpetrators returned, Hill drove them away.<sup>56</sup> He was found guilty of aiding and abetting armed robbery.<sup>57</sup> The appellate court overturned Hill's conviction because there was insufficient evidence to convict him of accomplice liability.<sup>58</sup> The court stated that "[t]he mere presence of the accused at the scene of the crime does not essentially establish his guilt as an abettor . . . . [E]vidence of his mere presence without showing his preconcert with the actors is insufficient as proof of guilt."<sup>59</sup> There had been no testimony that contradicted the appellant's version of the facts—that he did not see a gun, he was not aware why the principal perpetrators asked him to stop the car, nor was he aware that when they returned that they had committed a robbery.<sup>60</sup> Furthermore, there had been no evidence that the appellant acted in any way as a look-out for the robbery.<sup>61</sup> Although it is true that there was a gun in his car, the gun was tucked under the seat, and Hill claimed to have never seen it before.<sup>62</sup>

However, the California courts have narrowed their definition of "mere presence" by allowing the jury to consider actions taken both before and after the crime when imposing liability. Compare the *Hill* case with *People v. Moore*.<sup>63</sup> Moore was accused of aiding and abetting an armed robbery of seven dollars, stolen at knifepoint.<sup>64</sup> As in *Hill*, there was no testimony that he actually physically assisted in the robbery.<sup>65</sup> Indeed, the victim testified that Moore "just stood at the steps. He did not do nothing. He did not say nothing; he just stood there."<sup>66</sup> However, when the police arrested Moore, they found the knife and the money in his pocket.<sup>67</sup> Moore argued that he could not be found liable as an aider and abettor for simply being

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56. *See id.*

57. *See id.* at 288, 175 P.2d at 45.

58. *See id.* at 294, 175 P.2d at 47.

59. *Id.*

60. *See id.* at 292–94, 175 P.2d at 48–49.

61. *See id.*

62. *See id.* at 289, 175 P.2d at 46.

63. 120 Cal. App. 2d 303, 260 P.2d 1011 (1953).

64. *See id.* at 304, 260 P.2d at 1012.

65. *See id.*

66. *Id.* at 305, 260 P.2d at 1012.

67. *See id.*

present at the time the crime was committed.<sup>68</sup> However, the court rejected this argument because Moore was in the “company of the other defendants before the crime was committed, remained with them during the robbery, fled with them from the hotel, and when arrested with the others he had the knife and stolen bills in his possession.”<sup>69</sup> This was sufficient evidence for the jury to infer that he had enough knowledge to have abetted in the commission of the crime.<sup>70</sup> Although mere presence at the crime scene is not enough to establish accomplice liability, it is evidence that the jury can consider in determining whether or not the defendant is guilty of aiding and abetting. The presence, companionship, and conduct of the defendant with the primary perpetrators before and after the offense are circumstances from which his criminal intent may be inferred.<sup>71</sup> The fact that Moore had the money and knife when he was arrested indicates an agreement between the defendant and the primary perpetrator, that is relevant to establish an intent to aid and abet.

### *B. Natural and Probable Consequences*

An accomplice is liable for the commission of any acts that the accomplice has knowledge of and actually intends to aid.<sup>72</sup> But what happens when the principal actor does something that the accomplice was not intending to assist, or the accomplice did not have knowledge of? In such situations, an accomplice could still be found liable for acts the accomplice had no knowledge of, so long as the acts were within the natural and reasonable consequences of acts the accomplice *did* have knowledge of.<sup>73</sup>

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68. *See id.* at 306, 260 P.2d at 1013.

69. *Id.*

70. *See id.* at 306–07, 260 P.2d at 1013–14.

71. *See id.*

72. *See* *People v. Beltran*, 94 Cal. App. 2d 197, 210 P.2d 238 (1949).

73. *See id.* at 206, 210 P.2d at 243 (holding that “persons who aid and abet in the commission of a criminal offense, though not being present, are liable for all the natural and probable consequences incident to the commission of the act which they have counseled or advised.”) *Id.* at 205, 210 P.2d at 243, *People v. Kauffman*, 152 Cal. 331, 92 P. 861 (1907) (holding that the jury can impose liability if they find an act is the natural and probable consequence of the accomplice’s actions).



The court has found that in order to determine what is a natural and reasonable consequence, it must first make several factual determinations.<sup>74</sup> First, the court must determine what crimes were actually committed. Then, the court must determine what offenses were reasonably foreseeable consequence of those crimes.<sup>75</sup> As a result, the accomplice is not automatically liable for the actions of the primary perpetrator. "Accordingly, an aider and abettor may be found guilty of crimes . . . which are less serious than the gravest offense the perpetrator commits."<sup>76</sup> The accomplice's guilt is directly related to the foreseeability of the perpetrator's criminal acts.<sup>77</sup>

In *People v. Brigham*, the court explained that when determining whether the actions of the primary perpetrator were reasonably foreseeable by the accomplice, liability is based on an objective analysis of causation, not the subjective view of what the accomplice believed might occur.<sup>78</sup> Under an objective analysis, the jury must determine whether a reasonable person, under similar circumstances as the defendant, would recognize that the crime committed by the primary perpetrator was a reasonably foreseeable consequence of the act that the defendant was aiding and abetting.<sup>79</sup> This finding will depend on the circumstances surrounding the conduct of both the perpetrator and the aider and abettor.<sup>80</sup> The jury can consider "not [only] the circumstances prevailing prior to or at the commencement of the [criminal] endeavor, but must include all of the circumstances leading up to the last act by which the participant directly or indirectly aided or encouraged the principal actor in the commission of the crime."<sup>81</sup>

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74. See *People v. Woods*, 8 Cal. App. 4th 1570, 1587, 11 Cal. Rptr. 2d 231, 240 (1992).

75. See *id.* at 1586, 11 Cal. Rptr. 2d at 239-40.

76. *Id.* at 1586-87, 11 Cal. Rptr. 2d at 240.

77. See *id.*

78. 216 Cal. App. 3d 1039, 1051, 265 Cal. Rptr. 486, 493 (1989).

79. See *id.*

80. See *id.* at 1053-54, 265 Cal. Rptr. at 494-96; *People v. Jardine*, 116 Cal. App. 3d 907, 172 Cal. Rptr. 408 (1981).

81. *Nguyen*, 21 Cal. App. 4th at 532, 26 Cal. Rptr. 2d at 332.

In *People v. Nguyen*, eight men robbed a tanning salon, threatened the owner with guns, and pinned her to the floor.<sup>82</sup> While pinned to the floor, one of the robbers placed a gun in the owner's vagina and threatened to fire it if she did not give them her valuables.<sup>83</sup> These same individuals went on to rob a local spa, but this time, one of the robbers fondled and sexually violated the owner with a finger.<sup>84</sup> The other perpetrators were convicted of robbery and of aiding and abetting sexual penetrations with foreign objects.<sup>85</sup> On appeal, they argued that the forcible sexual penetrations were neither reasonably foreseeable nor the natural and probable consequence of robbery.<sup>86</sup> However, the court found ample evidence that the sexual offenses were a reasonably foreseeable result of the defendants' participation in the robbery, especially because they were charged with two different assaults.<sup>87</sup> The defendants chose to rob places that they believed were engaged in prostitution and had a "sexual aura."<sup>88</sup> Additionally, those defendants who did not commit the actual assault did aid in its perpetration because their presence at the crime provided security and control to those who were actually engaged in the sexual assault.<sup>89</sup> The court found that given these circumstances, the "foreseeability of sexual assault went from possible or likely to certain, yet defendants continued to lend their aid and assistance to the endeavor."<sup>90</sup> Thus, there was plenty of evidence for a jury to believe that a reasonable person would have known that the sexual assault was a natural and probable result of aiding and abetting the robbery.<sup>91</sup>

The court further clarified the jury instructions regarding natural and probable circumstances for aiding and abetting in *People v. Prettyman*.<sup>92</sup> There, the defendant, Bray, was convicted of murder as

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82. *See id.* at 526, 26 Cal. Rptr. 2d at 327.

83. *See id.*

84. *See id.*

85. *See id.* at 524, 26 Cal. Rptr. 2d at 326.

86. *See id.* at 527-28, 26 Cal. Rptr. 2d at 328-29.

87. *See id.* at 533, 26 Cal. Rptr. 2d at 332.

88. *Id.*

89. *See id.* at 533, 26 Cal. Rptr. 2d at 333.

90. *Id.* at 534, 26 Cal. Rptr. 2d at 333.

91. *See id.*

92. 14 Cal. 4th 248, 926 P.2d 1013, 58 Cal. Rptr. 2d 827 (1996).

an aider and abettor.<sup>93</sup> She encouraged the primary perpetrator to beat a man in order to retrieve her wallet.<sup>94</sup> The primary perpetrator's subsequent beating of the man caused him to choke on his blood and die.<sup>95</sup> At trial, the prosecutor argued that even if Bray did not intend for the perpetrator to murder the victim, she should still be found guilty because the murder was within the natural and probable consequences of the primary perpetrator's actions.<sup>96</sup> The trial court instructed the jury that Bray could be found liable "for the *natural and probable consequences* of the commission of [a] crime."<sup>97</sup> The court stated that the jury must engage in a two-step process. First, the jury must determine whether the defendant was guilty of the crime that was originally contemplated. If the jury determines that the defendant was guilty of the originally contemplated crime, they must then determine whether any of the other charged crimes were a natural and probable circumstance of the crime that was originally contemplated.<sup>98</sup> The court did not instruct the jury about the elements of any criminal acts that Bray was alleged to have contemplated.<sup>99</sup> The jury convicted Bray and she appealed, arguing that the trial court had committed prejudicial error by not "identifying [or] describing any target or predicate crime that she might have originally contemplated."<sup>100</sup>

The California Supreme Court reversed, stating that the trial court must identify the uncharged crimes that the prosecution

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93. See *id.* at 254, 926 P.2d at 1015, 58 Cal. Rptr. 2d at 829.

94. See *id.* at 255–56, 926 P.2d at 1015–16, 58 Cal. Rptr. 2d at 829–30.

95. See *id.*

96. See *id.* at 264–65, 926 P.2d at 1022, 58 Cal. Rptr. 2d at 836.

97. *Id.* at 257, 926 P.2d at 1017, 58 Cal. Rptr. 2d at 831.

98. See *id.* The court notes that this instruction was very similar to the original (1988) version of CALIFORNIA JURY INSTRUCTIONS No. 3.02 which reads:

One who aids and abets is not only guilty of the particular crime that to [his] [her] knowledge [his] [her] confederates are contemplating committing, but [he] [she] is also liable for the natural and probable consequences of any criminal act that [he] [she] knowingly and intentionally aided and abetted. You must determine whether the defendant is guilty of the crime originally contemplated, and, if so, whether the crime charged was a natural and probable consequence of such originally contemplated crime. *Id.*

99. See *id.* at 258, 926 P.2d at 1018, 58 Cal. Rptr. 2d at 831.

100. *Id.*

contends the defendant knowingly and intentionally aided and abetted.<sup>101</sup> Otherwise, the jury cannot properly engage in the two-step process of determining whether the actually charged crime was a natural and probable consequence of the uncharged crimes.<sup>102</sup> Therefore, the court required a jury instruction on aiding and abetting and natural and probable circumstances to include the possible criminal acts that might have been originally contemplated by the defendant.<sup>103</sup> It held that a failure to do so constitutes reversible error.<sup>104</sup>

*C. Required Relationship between Aider and Abettor  
and Primary Perpetrator*

1. An aider and abettor cannot be convicted of a greater offense during the same trial on the same evidence

Since accomplice liability is based on the notion of derivative liability, California recognizes that it is not possible for an aider or abettor to be guilty of a greater offense than the offense the principal offender is guilty of if they are tried on the same evidence at the same trial.<sup>105</sup>

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101. See *id.* at 267, 926 P.2d at 1024, 58 Cal. Rptr. 2d at 837.

102. See *id.*

103. See *id.*

104. See *id.* In this case, although it was error to not instruct the jury on the possible criminal acts that might have been originally contemplated, the court found that it was not prejudicial because her attorney did not object at the time. See *id.* Bray attempted to argue that failing to instruct the jury on the underlying crime was per se error similar to failing to instruct the jury about the underlying elements of a crime and therefore violated her constitutional rights to due process. The California Supreme Court disagreed stating that "the instruction[s] [did] not withdraw an element from the jury's determination or otherwise interject an impermissible presumption into the deliberative process . . . nor [did] they fail[] to instruct the jury that it must find a particular intent in order to find guilt." *Id.* at 272, 96 P.2d at 1027, 58 Cal. Rptr. 2d at 841. Furthermore, the court stated that "there [was] no 'reasonable likelihood' that the jury misapplied the trial court's instructions on the 'natural and probable consequences' doctrine, and thus no federal constitutional error occurred." *Id.*

105. See *People v. Williams*, 75 Cal. App. 3d 731, 737, 142 Cal. Rptr. 704, 708 (1977).

This doctrine was most recently reaffirmed in *People v. McCoy*.<sup>106</sup> There, two defendants, McCoy and Lakey, were tried for murder, with Lakey being convicted under an aiding and abetting theory.<sup>107</sup> On appeal, McCoy's conviction was reversed for failure to properly instruct the jury on imperfect self-defense.<sup>108</sup> As a result, the court of appeal reversed Lakey's conviction as well because an aider and abettor cannot be convicted of an offense that is greater than that of the actual perpetrator, provided that both defendants are tried in the same trial upon the same evidence.<sup>109</sup> Because aiding and abetting is a means of deriving liability from another's commission of a crime, it would be illogical for a jury to find an accomplice liable for aiding and abetting a crime that the jury decided the primary perpetrator had not committed.<sup>110</sup>

However, although an accomplice cannot be convicted of a greater crime, an accomplice can still be convicted of a lesser crime based on the same evidence.<sup>111</sup> In *People v. Woods*, the defendants, Windham and Woods, were charged with murder.<sup>112</sup> Windham was prosecuted under an aiding and abetting theory.<sup>113</sup> The trial court instructed the jury that they could not find Windham guilty of aiding and abetting second-degree murder unless they found his co-defendant, Woods, guilty of second-degree murder.<sup>114</sup> The jury found Woods guilty of first-degree murder, and because of the jury instruction, likewise found Windham guilty of first-degree murder.<sup>115</sup> The court of appeal reversed the conviction, stating that because an aider and abettor could have foreseen aiding a lesser offense than that committed by the primary perpetrator, his liability could be less

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106. 79 Cal. App. 4th 67, 93 Cal. Rptr. 2d 827 (2000).

107. *See id.* at 81, 93 Cal. Rptr. 2d at 837.

108. *See id.* at 71, 93 Cal. Rptr. 2d at 830.

109. *See id.*

110. *See id.* at 82-84, 93 Cal. Rptr. 2d at 838-840.

111. *See People v. Woods*, 8 Cal. App. 4th 1570, 11 Cal. Rptr. 2d 231 (1992).

112. *Id.* at 1577, 11 Cal. Rptr. 2d at 233.

113. *See id.* at 1579, 11 Cal. Rptr. at 234.

114. *See id.*

115. *See id.*

than that of the primary perpetrator.<sup>116</sup> The court found it was error to fail to instruct the jury in that regard.<sup>117</sup>

## 2. No conviction of principal perpetrator required

While the jury cannot convict an accomplice of a greater offense when both the accomplice and primary perpetrator are tried at the same time on the same evidence, it is possible to convict an accomplice of a greater crime when the two are tried at separate times, even if the accomplice is tried before the primary perpetrator.<sup>118</sup> In the recent California Supreme Court decision of *People v. Garcia*, the court reversed the court of appeal by holding that conviction of the principal agent is not required before imposing derivative liability on an accomplice.<sup>119</sup> In that case, the victim was killed in a drive-by-shooting.<sup>120</sup> At the time of his arrest, the defendant admitted to his involvement as an accomplice, stating that he was the driver of the car.<sup>121</sup> He was charged and convicted of murder.<sup>122</sup> The trial judge also found him guilty of a sentencing enhancement for discharging a firearm in the commission of a murder.<sup>123</sup> The defendant appealed this conviction, arguing that the prosecutor had not proven all the elements necessary for the sentencing enhancement to apply.<sup>124</sup> "Defendant argued that although he was an aider and abettor and not the shooter, the firearm enhancement could apply to him only if allegations under sections 12022.53, subdivision (d) . . . were 'pled and proved.'"<sup>125</sup> The court

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116. *See id.* at 1589, 11 Cal. Rptr. at 241–42.

117. *See id.*

118. *See People v. Garcia*, 28 Cal. 4th 1166, 52 P.3d 648, 124 Cal. Rptr. 2d 464 (2002).

119. *See id.* at 1177, 52 P.3d at 655, 124 Cal. Rptr. 2d at 472.

120. *See id.* at 1169–70, 52 P.3d at 649–50, 124 Cal. Rptr. 2d at 466.

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.*

125. *Id.* CAL. PENAL CODE § 12022.53(d) (Deering 2001) states:

[A]ny person who is convicted of a felony . . . and who in the commission of that felony intentionally and personally discharged a firearm and proximately caused great bodily injury . . . or death, to any person other than an accomplice, shall be punished by a term of imprisonment of 25 years to life in the state prison, which shall be

rejected this argument because the prosecution would face too much of a burden if it were required to convict the primary perpetrator before it could convict an aider and abettor.<sup>126</sup> The court's concern in adopting such an approach to aiding and abetting liability was that the primary perpetrators would use procedural devices to ensure that they were tried after the accomplice, thereby allowing the accomplice to escape liability.<sup>127</sup> The court noted that although some defendants may escape conviction, the State should be able to prosecute defendants when there is substantial evidence introduced that would sustain a conviction.<sup>128</sup> An accomplice should not be able to escape conviction simply because the State failed to meet its burden against another defendant.<sup>129</sup>

#### *D. Conclusion*

The doctrine of accomplice liability seeks to hold everyone who assists in a crime responsible for the entire crime, even if their actions do not directly aid in the commission of the crime. The hope is that by allowing liability even when the actions taken do not directly assist the crime, the State is deterring people from assisting in the commission of a crime. This form of derivative liability has become deeply rooted in California penal law, as well as most of the United States. Despite a few areas of obscurity, the law in California appears to be fairly well-settled.

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imposed in addition and consecutive to the punishment prescribed for that felony.

This section is applied to both principals and aiders and abettors. *See* CAL. PENAL CODE §§ 31, 12022.53(e)(1) (Deering 2001).

126. *See Garcia*, 28 Cal. 4th at 1177, 52 P.3d at 655, 124 Cal. Rptr. 2d at 472.

127. *See id.* Furthermore, the court believed that this had the strong possibility of creating odd results. For example, what if the primary perpetrator were also killed during the commission of the crime. The aider and abettor would escape liability because the State would not be able to prosecute the primary perpetrator first.

128. *See id.*

129. *See id.* at 1177, 52 P.3d at 655, 124 Cal. Rptr. 2d at 472.

## VIII. CONSPIRACY IN HOMICIDE\*

The California Penal Code defines the crime of conspiracy as “two or more persons conspir[ing] . . . [t]o commit any crime,”<sup>1</sup> together with proof of the commission of an overt act “by one or more of the parties to such agreement” in furtherance thereof.<sup>2</sup> Criminalization of conspiracy performs two main functions. The first function is to interrupt criminal activity before its completion.<sup>3</sup> As an inchoate crime,<sup>4</sup> conspiracy subjects the defendant to criminal sanctions at a stage earlier than any other offense, including attempt.<sup>5</sup> The second function is to guard against the evils of group danger.<sup>6</sup> As recognized in *People v. Welch*, “a group of evil minds planning and giving support to the commission of crime is more likely to be a

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1. CAL. PENAL CODE § 182(a)(1) (West 1999). In addition to crimes, CAL. PENAL CODE § 182(a)(5) specifies that the object of a conspiracy may be “[t]o commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.” CAL. PENAL CODE § 182(a)(5). Conceivably, a statutory conspiracy definition as broad as “any act injurious to the public health [or] morals” would grant California courts enormous discretion in determining what is punishable as a conspiracy. *Id.* However, it has been remarked that this portion of the statute is rarely employed as a basis for prosecution. See Walton E. Tinsley, Comment, *Criminal Law—Conspiracy and Conspirators in California*, 26 S. CAL. L. REV. 64, 66 (1952).

2. CAL. PENAL CODE § 184; see also CALJIC § 6.10 (6th ed. 2002) (defining conspiracy as “an agreement entered into between two or more persons with the specific intent to agree to commit” a specific crime, “and with the further specific intent to commit that crime, followed by an overt act committed in this state by one [or more] of the parties for the purpose of accomplishing the object of the agreement.”).

3. See Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925, 929 (1977).

4. An inchoate crime is a preparatory or anticipatory crime, “permitting the punishment of persons who agree to commit a crime even if they never carry out their scheme or are apprehended before achieving their objective.” Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1157 (1973).

5. Conspiracy is a crime at the moment a minor act is taken in furtherance of the agreement, whereas attempt usually involves a substantial step toward the commission of the crime. See Marcus, *supra* note 3, at 929–30.

6. See *id.*



menace to society than where one individual alone sets out to violate the law.”<sup>7</sup> These two functions make conspiracy distinct from the contemplated substantive offense and punishable as a separate crime.<sup>8</sup>

When one understands the rationale underlying the doctrine of conspiracy, it becomes clear that this doctrine carries broad implications as applied to homicide in California. First, as an inchoate or preparatory crime, conspiracy enables the prosecution of culpable cohorts for agreeing to commit murder even when the actual crime has not been committed. Although one person thinking and planning a murder is not punishable for murder unless his efforts extend far enough to constitute attempt, two or more people acting in combination yields a basis for imposing the penalty even before attempt.<sup>9</sup> Second, as mentioned previously, in California “conspiracy is a separate and distinct offense from the crime committed.”<sup>10</sup> This means that if a person plans a murder with another, but for some reason never carries out the murder or is arrested prior to its commission, he is still punishable for the crime. Alternatively, if he does succeed in the killing, he may be convicted both for the conspiracy and for the underlying substantive offense.<sup>11</sup>

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7. 89 Cal. App. 18, 22, 264 P. 324, 325 (1928). This is true because more people can share the work, thereby enabling and encouraging the selection of more elaborate and ambitious goals. Moreover, the moral support of the group strengthens the perseverance of each member of the conspiracy and discourages any reevaluation of the decision to commit the offense that a single offender might undertake. *See People v. Alleyne*, 82 Cal. App. 4th 1256, 1261–62, 98 Cal. Rptr. 2d 737, 740–41 (2000).

8. *See People v. Swain*, 12 Cal. 4th 593, 599–600, 909 P.2d 994, 996–97, 49 Cal. Rptr. 2d 390, 392–93 (1996) (stating that conspiracy is an inchoate crime that does not require commission of a substantive offense that is the object of the conspiracy); *People v. Liu*, 46 Cal. App. 4th 1119, 1131, 54 Cal. Rptr. 2d 578, 584 (1996) (stating that “Completion of the crime of conspiracy does not require that the object of the conspiracy be accomplished, or even that it be possible to accomplish it.”).

9. *See* MODEL PENAL CODE § 5.03 cmt. 1 (Official Draft and Revised Comments 1985) (explaining why reaching farther back into preparatory conduct than attempt is desirable).

10. *People v. Williams*, 101 Cal. App. 3d 711, 721, 161 Cal. Rptr. 830, 835 (1980).

11. *See People v. Cooks*, 141 Cal. App. 3d 224, 317, 190 Cal. Rptr. 211, 278 (1983) (stating that “[S]ince conspiracy is a separate and distinct crime, a

The extended reach of criminal liability derives from the realization that the “strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer”<sup>12</sup> and that it is desirable to be able to sanction against groups that engage in preparatory conduct which cannot be reached by the law of attempt.<sup>13</sup>

Furthermore, the so-called co-conspirator liability (or Pinkerton doctrine) makes a conspirator liable for any reasonably foreseeable crime that falls within the scope of the conspiracy, even if he did not intend to assist in any manner or otherwise facilitate or encourage the commission of that crime.<sup>14</sup> Therefore, if a person agreed to commit any crime (not necessarily murder) and the result of a killing was both foreseeable and in furtherance of the conspiracy, he would be held accountable for the killing, regardless of whether he was aware of it.

In California, the defense of withdrawal also operates differently for a conspiracy than for other crimes.<sup>15</sup> Withdrawal from a conspiracy, once an overt act has been done, is only a defense to subsequent criminal acts, not to the conspiracy itself.<sup>16</sup> To illustrate, imagine that a group of people agree to construct and plant a bomb in the hapless victim’s house. After ingredients for the home-made bomb are purchased, however, one of the conspirators decides to pull out of the plan. Although the conspirator who withdraws is not technically on the hook for any substantive crimes that ensue, he cannot evade liability for the *original conspiracy* to commit murder, which carries the same punishment as if the conspirator is charged for the murder itself.

Finally, because conspiracy is a separate and distinct crime, it provides an alternative to prosecution for the specific substantive offenses committed by the conspirators. This alternative is often taken because of the numerous procedural advantages that are

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defendant may be prosecuted and convicted of the substantive offense and of conspiracy to commit that offense.”).

12. *Williams*, 101 Cal. App. 3d at 721, 161 Cal. Rptr. at 835 (citations omitted).

13. See Johnson, *supra* note 4, at 1157.

14. See discussion *infra* Part VI.B.2.

15. See discussion *infra* Part VI.D.

16. See *id.*

afforded the government, including: (1) expanded venue choices;<sup>17</sup> (2) potential statute of limitations extensions;<sup>18</sup> and (3) special evidentiary considerations.<sup>19</sup> Within the framework of homicide law, these features make conspiracy a powerful and dangerous doctrine if abused.<sup>20</sup>

### *A. Elements of Offense*

The elements of a criminal conspiracy are:

1) an agreement between two or more persons, 2) with the specific intent to agree to commit a public offense, 3) with the further specific intent to commit that offense, and 4) an overt act committed by one or more of the parties for the purpose of accomplishing the object of the agreement or conspiracy.<sup>21</sup>

#### *1. Agreement*

##### *a. the act of agreement*

The gist of a criminal conspiracy is the unlawful agreement.<sup>22</sup> The act of agreement is the basis for imposing early criminal liability, special evidentiary rules, double prosecutions, and double punishments.<sup>23</sup> Although an agreement is not punishable unless some overt act is committed in furtherance of the conspiracy,<sup>24</sup> the

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17. See discussion *infra* Section B.1.

18. See discussion *infra* Section C.

19. See discussion *infra* Section E.

20. See Johnson, *supra* note 4, at 1138.

21. People v. Liu, 46 Cal. App. 4th 1119, 1128, 54 Cal. Rptr. 2d 578, 582-83 (1996); see People v. Swain, 12 Cal. 4th 593, 600, 909 P.2d 994, 997, 49 Cal. Rptr. 2d 390, 393 (1996); People v. Herrera, 83 Cal. App. 4th 46, 64, 98 Cal. Rptr. 2d 911, 922 (2000); 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 68 (3d ed. 2000).

22. See People v. Von Villas, 11 Cal. App. 4th 175, 244, 15 Cal. Rptr. 2d 112, 154 (1992) (stating “[t]he punishable act, or the very crux, of a criminal conspiracy is the evil or corrupt agreement.”); People v. Manson, 71 Cal. App. 3d 1, 47, 139 Cal. Rptr. 275, 301 (1977) (referring to unlawful agreement as the “gravamen of the offense of conspiracy to commit a crime”).

23. See PAUL MARCUS, PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES § 2.02 (2002).

24. See CAL. PENAL CODE §§ 182(b), 184 (West 1999).

overt act itself need not be a criminal offense.<sup>25</sup> The agreement, not the overt act, constitutes the offense.<sup>26</sup>

In the early development of conspiracy law, the emphasis of criminality was placed on the physical act of communicating mutual understanding to a common unlawful enterprise.<sup>27</sup> For example, at common law, the statute of limitations began to run on a conspiracy as soon as such communication was made.<sup>28</sup> However, the focus has shifted from examining whether a *communication* of agreement was made to whether an agreement existed.<sup>29</sup>

Modern conspiracy cases hold that conspiracy is a continuing crime, extending beyond the initial communication of agreement.<sup>30</sup> In *People v. Von Villas*, the court explained that the agreement, being the very crux of conspiracy, is not a tangible occurrence.<sup>31</sup> Because the specific time when a common illegal design comes into existence can rarely be identified, an agreement is more appropriately thought of as a continuous act, making conspiracy a continuing crime.<sup>32</sup> In sum, the criminal act of modern conspiracy is not just communicating the agreement, but the continuous and conscious union of wills upon a common undertaking.<sup>33</sup> This broader definition of agreement allows, *inter alia*, the admission of more facts as evidence of overt acts. Because an agreement is continuous, an overt act is not limited to acts committed after a "complete agreement" has been decided upon.<sup>34</sup> Thus, once a punishable agreement is in existence, any discussions and arrangements between

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25. For a complete discussion of overt acts, see discussion *infra* Section A.3.

26. See *People v. Fenenbock*, 46 Cal. App. 4th 1688, 1709, 54 Cal. Rptr. 2d 608, 620-21 (1996).

27. See *Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920, 926 (1959) [hereinafter *Harvard Developments*].

28. See *id.*; see also *Von Villas*, 11 Cal. App. 4th at 243, 15 Cal. Rptr. 2d at 153 (holding that at common law, crime was complete when the agreement to accomplish some unlawful purpose had been reached); Tinsley, *supra* note 1, at 65.

29. See *Harvard Developments*, *supra* note 27, at 926.

30. See, e.g., *Von Villas*, 11 Cal. App. 4th at 244, 15 Cal. Rptr. 2d at 154 (explaining that conspiracy is a continuing crime).

31. See *id.*

32. See *id.*

33. See *Harvard Developments*, *supra* note 27, at 926.

34. See *Von Villas*, 11 Cal. App. 4th at 244, 15 Cal. Rptr. 2d at 154.

conspirators done in preparation of a criminal act can constitute overt acts in furtherance of the conspiracy.<sup>35</sup>

*b. proof of agreement*

As a practical matter, direct evidence is often not available and is rarely used to prove the agreement.<sup>36</sup> To establish a conspiracy, a formal written agreement is not necessary;<sup>37</sup> rather, a tacit understanding to accomplish the act and unlawful design is sufficient.<sup>38</sup> Such an agreement may be inferred from the acts and conduct of the parties in mutually carrying out a common purpose in violation of the law.<sup>39</sup>

In *People v. Alexander*, although there was not any direct evidence that the actors agreed to commit the particular murders, sufficient circumstantial evidence supported the defendant's conviction of conspiracy to commit murder.<sup>40</sup> The court inferred the agreement from signs of preparatory activities as well as a significant coordination among the conspirators both during and after the commission of the target offense.<sup>41</sup>

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35. See *People v. Sconce*, 228 Cal. App. 3d 693, 703-04, 279 Cal. Rptr. 59, 65 (1991) (holding that overt acts included the defendant pointing out the intended victim to a co-conspirator, the co-conspirator soliciting another conspirator, and the defendant inquiring one co-conspirator to kill the victim).

36. See MARCUS, *supra* note 23, § 2.02.

37. See *People v. Cooks*, 141 Cal. App. 3d 224, 311-12, 190 Cal. Rptr. 211, 274-75 (1983).

38. See *id.*

39. See, e.g., *People v. Superior Court (Quinteros)*, 13 Cal. App. 4th 12, 20-21, 16 Cal. Rptr. 2d 462, 467 (1993) (stating that unlawful agreement may be proved by circumstantial evidence without necessity of showing that conspirators met and actually agreed to commit the offense that was object of conspiracy); *Manson*, 61 Cal. App. 3d at 126-27, 132 Cal. Rptr. at 276 (holding that existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy).

40. See 140 Cal. App. 3d 647, 189 Cal. Rptr. 906 (1983).

41. See *id.* at 661-62, 189 Cal. Rptr. at 912-15. In *Alexander*, defendant donned heavy clothing before the incident, wielded a knife in the company of other assailants, effectively blocked a victim from escaping the attack of co-conspirators, directed other participants from a vantage point on the stairwell, and threw his knife out the window at the end of the riot; The assailants initiated their attack with deadly force, stabbing or attempting to stab the victim in the back, side, head and face. See *id.* All of the facts above

Similarly, in *People v. Tran*, circumstances surrounding the victim's death sufficiently supported a finding that the defendants agreed to commit an intentional killing.<sup>42</sup> The arrival of the defendants at the crime scene with a co-conspirator as a lookout and backup, combined with the swiftness with which the shooting began, was enough to show that the shooting resulted from a conspiracy between the defendants to kill the victim, not from a spontaneous argument.<sup>43</sup>

Although mere association with the perpetrator of a crime does not prove conspiratorial membership,<sup>44</sup> it is a starting point for analysis.<sup>45</sup> For instance, common gang membership may in part be circumstantial evidence of a conspiratorial agreement. In *People v. Superior Court (Quinteros)*, the court used a gang's motivation to guard its territory to infer an agreement among its members to beat up the victim.<sup>46</sup> This decision suggests that there is considerable flexibility in inferring an agreement from the facts and circumstances of the case, as long as there is a tacit coordination in the common design, purpose, or objects of the conspiracy.

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supported a reasonable inference that defendant acted in concert with the assailants to assault and murder other prison inmates. *See id.* at 661–62, 189 Cal. Rptr. at 914.

42. *See* 47 Cal. App. 4th 759, 772, 54 Cal. Rptr. 2d 905, 913 (1996).

43. *See id.* at 772–73, 54 Cal. Rptr. 2d at 913.

44. *See* CALJIC, *supra* note 2, §§ 6.13, 6.22 (stating that association alone does not prove membership; and that the facts as to each defendant must be considered).

45. *See Manson*, 61 Cal. App. 3d at 126, 132 Cal. Rptr. at 276 (stating that the very nature of the case and the theory of the prosecution “compel[s] reference to circumstantial evidence of the conduct and relationship of the parties.”).

46. *See Superior Court (Quinteros)*, 13 Cal. App. 4th at 21, 16 Cal. Rptr. 2d at 467 (holding that defendant's act in issuing the challenge, “Where are you from?”, and attempting to extort money for the right to have intruded into his gang territory evidenced a relationship between the territory and the defendant's and his fellow gang members' conduct toward the victims).

## 2. The mental state

Conspiracy is a "specific intent" crime.<sup>47</sup> The specific intent required divides into two elements: (1) intent to agree or conspire; and (2) intent to commit the target crime (e.g., murder).<sup>48</sup> "To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree *but also that they intended to commit the elements of that offense.*"<sup>49</sup>

### *a. intent to agree*

Because there can be no conspiracy without an agreement, the prosecution must establish that the several parties intended to agree.<sup>50</sup> However, the intent to agree in itself is "without moral content."<sup>51</sup> It derives its wrongfulness from the objectives the parties intended to achieve by their agreement.<sup>52</sup> Thus, the state of mind for the agreement is generally less important than the intent to commit the crime because the prosecution cannot pursue a conspiracy charge unless there is substantial evidence indicating that the parties combined with some criminal objective in mind.<sup>53</sup>

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47. Specific intent is an intent that goes beyond the required acts. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., CRIMINAL LAW § 6.4(e)(2) (2d ed. 1986); MARCUS, *supra* note 23, § 2.09[3] (explaining that in their agreement the parties must understand that they are uniting to commit a crime, and it must be their desire [specific intent] to complete that crime as the result of their combination); *Harvard Developments*, *supra* note 27, at 935 (stating that specific intent is used to denote "something more than merely a corrupt or wrongful purpose.").

48. *See* *People v. Swain*, 12 Cal. 4th 593, 600, 909 P.2d 994, 997, 49 Cal. Rptr. 2d 390, 393 (1996).

49. *Id.*

50. *See* LAFAVE & SCOTT, *supra* note 47, § 2.09(e)(1).

51. *Harvard Developments*, *supra* note 27, at 936.

52. *See id.*

53. "Prosecutors do not generally have difficulty showing conclusively a genuine agreement . . . [and] [t]he true state of mind issue in conspiracy cases most often relates not to the agreement phase of the parties' conduct, but rather to the objects of that agreement." MARCUS, *supra* note 23, § 2.09[2].

*b. intent to achieve objective—intent to kill required  
for conspiracy to commit murder*

Conspiracy has often been described as a specific intent crime because the intent required is more than the intent to agree.<sup>54</sup> For criminal liability to attach, an additional intent to commit a particular act or crime must be proved.<sup>55</sup> Furthermore, a “conspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself.”<sup>56</sup>

If the substantive offense is murder, a conspiracy to commit that offense requires an intent to kill and cannot be based on a theory of implied malice.<sup>57</sup> In *People v. Swain*, the defendants were convicted of conspiracy to commit second-degree murder after participating in a drive-by shooting.<sup>58</sup> Because implied malice does not require a finding of intent to kill, the defendants contended that the trial court improperly instructed the jury on an implied malice theory to determine whether they could be found guilty of conspiracy to commit murder. The California Supreme Court agreed, holding that a conviction for conspiracy to commit murder could not be sustained on an implied malice jury instruction and that a specific intent to kill must be proved.<sup>59</sup>

As the court explained, a conceptual problem arises when the target offense of murder is founded on a theory of implied malice.<sup>60</sup>

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54. See LAFAVE & SCOTT, *supra* note 47, § 6.4 (e) n.142.

55. See Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 635 (1941).

56. *Harvard Developments*, *supra* note 27, at 939.

57. California recognizes three theories of second-degree murder: 1) intentional unpremeditated murder with express malice, 2) implied malice murder (or unintentional killing resulting from extreme recklessness), and 3) second-degree felony-murder. The theory at issue here is implied malice murder, which occurs when: 1) the killing resulted from an intentional act; 2) the natural consequences of the act are dangerous to human life; and 3) the act was deliberately performed with the knowledge of the danger to, and with conscious disregard for, human life. *Swain*, 12 Cal. 4th at 601, 909 P.2d at 997–98, 49 Cal. Rptr. 2d at 393–94. For a detailed discussion of implied malice murder, see discussion *supra* Part IV, Second-Degree-Murder under an Implied Malice Theory.

58. See *id.* at 596, 909 P.2d at 994, 49 Cal. Rptr. 2d at 390.

59. See *id.* 909 P.2d at 994–95, 49 Cal. Rptr. 2d at 390–91.

60. See *id.* at 602, 909 P.2d at 998, 49 Cal. Rptr. 2d at 394.



Normally, malice aforethought is derived or implied through hindsight from proof of both a specific intent to perform some act dangerous to human life and a killing that has occurred as a direct result of such an act.<sup>61</sup> However, this is contrary to the very nature of the crime of conspiracy, which is an inchoate crime that does not require the successful commission of the target offense.<sup>62</sup> Because conspiracy to commit murder is a distinct crime from murder that does not require an actual killing, it would be illogical to convict based on implied malice, where the conspiracy could not be established until and unless a death resulted from an intentional act.<sup>63</sup> Thus, the court held that the crime of conspiracy to commit murder required express malice and that such an offense could not be grounded on implied malice.<sup>64</sup>

*c. conspiracy to murder is automatically first-degree murder*

In California, persons who conspire to commit a felony are punishable in the same manner as those who commit the felony.<sup>65</sup> However, *Swain* left unresolved the issue of whether conspiracy to commit murder was further divisible into degrees with differing punishments, or whether it was a unitary offense for which the punishment was first-degree murder in every instance.<sup>66</sup> The California Supreme Court settled the question in *People v. Cortez* by ruling that all conspiracies to commit murder are necessarily conspiracies to commit premeditated and deliberate first-degree murder.<sup>67</sup> In *Cortez*, the defendant was involved in a drive-by shooting that led to retaliatory gunshots by the other gang. Ultimately, the exchange of gunfire ended in the death of the defendant's companion.<sup>68</sup> The defendant was convicted of conspiracy to commit murder, based on his agreement with the

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61. See *id.* at 603, 909 P.2d at 999, 49 Cal. Rptr. 2d at 395.

62. See *id.*

63. See *id.*

64. See *id.* at 607, 909 P.2d at 1001, 49 Cal. Rptr. 2d at 397.

65. See CAL. PENAL CODE § 182(a).

66. See *Swain*, 12 Cal. 4th at 609–10, 909 P.2d at 1003, 49 Cal. Rptr. 2d at 399.

67. See 18 Cal. 4th 1223, 1231–32, 960 P.2d 537, 542, 77 Cal. Rptr. 2d 733, 738 (1998).

68. See *id.* at 1227, 960 P.2d at 539, 77 Cal. Rptr. 2d at 735.

victim to kill rival gang members.<sup>69</sup> Defendant contended on appeal that the trial court should have required the jury to determine the degree of the murder for the target offense of the conspiracy.<sup>70</sup> Relying on *People v. Horn*,<sup>71</sup> he argued that not all conspiracies to commit murder were necessarily conspiracies to commit first-degree murder.<sup>72</sup>

The *Cortez* court rejected the defendant's argument and disapproved of *Horn*'s discussion regarding the viability of the offense of conspiracy to commit intentional unpremeditated second-degree murder.<sup>73</sup> Noting functional similarity between premeditation and a conspiratorial agreement, the court observed that two individuals cannot harbor the mental state required to conspire to commit purposeful murder and also commit an overt act without having willfully "premeditated and deliberated" the commission of that murder.<sup>74</sup> Because the agreement to murder "*necessarily involves the 'willful, deliberate and premeditated' intention to kill a human being,*" a conspiracy to commit murder can only be conspiracy to commit murder in the first degree.<sup>75</sup>

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69. *See id.*

70. *See id.*

71. 12 Cal. 3d 290, 524 P.2d 1300, 115 Cal. Rptr. 516 (1974).

72. *See Cortez*, 18 Cal. 4th at 1233-34, 960 P.2d at 543, 77 Cal. Rptr. 2d at 739.

73. *See id.* at 1234, 960 P.2d at 543, 77 Cal. Rptr. 2d at 739.

74. *See id.* at 1232, 960 P.2d at 542, 77 Cal. Rptr. 2d at 738. *But see* Justice Kennard's discussion of why conspiracy to murder should be divided into degrees:

If conspiracy to murder were a unitary crime that required only intent to kill, which is the mental state of second degree murder, but was punished as first degree murder, then conspiracies that involve agreements to commit only the elements of second degree murder (e.g., that lack premeditation and deliberation) would be punished more severely than the completed crime of second degree murder.

*Id.* at 1246, 960 P.2d at 551-52, 77 Cal. Rptr. 2d at 747-48 (Kennard, J., dissenting). Justice Kennard also argued that a conspiracy to commit second degree murder was theoretically possible. *See id.* at 1249, 960 P.2d at 553-54, 77 Cal. Rptr. 2d at 749-50 (Kennard, J., dissenting).

75. *Id.* at 1231, 960 P.2d at 541, 77 Cal. Rptr. 2d at 737. There is a potentially far-reaching implication of the court's ruling in *Cortez*. A conspiracy to commit murder requires that the participants intend to kill. In holding that "intent to kill plus conspiratorial agreement equals conspiracy to

*d. proof of intent*

The prosecution can use circumstantial evidence to show that the defendant had the intent both to join the conspiracy and to complete the offense. For instance, in *People v. Han*, the defendants were convicted of a conspiracy to murder a co-conspirator's twin sister.<sup>76</sup> They contended that the sister might have intended to kill her twin, but that they, as her accomplices, were ignorant of the objective.<sup>77</sup> In recounting the facts of the case in detail,<sup>78</sup> the court rejected the defendants' argument and concluded that enough circumstantial evidence supported the conclusion that the object of defendants' conspiracy was murder.<sup>79</sup> A conspiracy to commit murder was inferred from evidence of related facts and circumstances which demonstrated that the participants' activities could not have been carried out except as a result of the preconceived scheme or common understanding.<sup>80</sup>

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commit first degree murder, the majority appeared to equate conspiratorial agreement with premeditation and deliberation." Suzanne Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference*, 36 U.S.F. L. REV. 261, 328-29 (2002).

76. See 78 Cal. App. 4th 797, 804-05, 93 Cal. Rptr. 2d 139, 144-45 (2000).

77. See *id.* at 803, 93 Cal. Rptr. 2d at 144.

78. The defendants posed as magazine salesmen and burst inside the victim's apartment with nylon twine and duct tape, while armed with a loaded gun. In the brief time before the police arrived, they terrorized the victim, tied her up, and placed her in a bathtub at gunpoint. See *id.* at 799-800, 93 Cal. Rptr. 2d at 141.

79. See *id.* at 803-04, 93 Cal. Rptr. 2d at 144.

80. See also *People v. Herrera*, 70 Cal. App. 4th 1456, 1464, 83 Cal. Rptr. 2d 307, 311 (1999) (holding that conviction for conspiracy to commit murder was supported by evidence that a rival street gang killed a member of the defendant's gang, that the defendant told his girlfriend that his fellow gang members were after the rival gang and he was going to "back up" his gang brothers, and that the defendant fired shots at the target's apartment); *Von Villas*, 11 Cal. App. 4th at 248, 15 Cal. Rptr. 2d at 156-57 (holding that circumstantial evidence that the victim disappeared, and completely ceased normal daily activities, and testimony of the victim's wife that she paid defendant to kill victim, sufficiently supported defendant's conviction for conspiracy to murder).

### 3. Overt act

At common law, conspiracy consisted of an unlawful agreement, but an overt act was not required to establish the crime.<sup>81</sup> Today, California, like most states,<sup>82</sup> requires proof of an overt act.<sup>83</sup> Consequently, the state must show that one of the conspirators took some step to further the object of the conspiracy. "One purpose of the overt act requirement is to provide . . . an opportunity to repent so that any one of the conspirators may reconsider and abandon the agreement before taking steps to further it, and thereby avoid punishment for the conspiracy."<sup>84</sup> Another purpose is to show that an indictable conspiracy exists because "evil thoughts alone cannot constitute a criminal offense."<sup>85</sup>

#### *a. what qualifies as an overt act?*

Although commentators, judges, and lawyers have had an ongoing debate about the crime of conspiracy, in both theory and in practice, virtually all agree that very little is required to satisfy the overt act requirement.<sup>86</sup> The act in furtherance of the conspiracy need not be criminal in nature,<sup>87</sup> nor does it need to amount either to

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81. See ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 685 (3d ed. 1982).

82. See LAFAVE & SCOTT, *supra* note 47, § 6.5(e). A few states, such as Louisiana and Mississippi, still follow the common law rule that no overt act needs to be proven.

83. See CAL. PENAL CODE § 184 (West 1999).

84. *People v. Russo*, 25 Cal. 4th 1124, 1131, 25 P.3d 641, 645, 108 Cal. Rptr. 2d 436, 441 (2001).

85. *Id.* at 1131, 25 P.3d at 645, 108 Cal. Rptr. 2d at 441 (citations omitted).

86. See MARCUS, *supra* note 23, § 2.08[3]; see also MODEL PENAL CODE § 5.03 cmt. at 454 (Official Draft and Revised Comments 1985) ("[I]t has been well settled that any act in pursuance of the conspiracy, however insignificant, is sufficient."); Solomon A. Klein, *Conspiracy—The Prosecutor's Darling*, 24 BROOK. L. REV. 1, 5 (1957) ("Any act, 'no matter what,' will suffice, if committed by one or more of the parties to such agreement under circumstances warranting an inference that it was done in furtherance thereof.").

87. See *People v. Robinson*, 43 Cal. 2d 132, 139, 271 P.2d 865, 870 (1954); *Sconce*, 228 Cal. App. 3d at 700, 279 Cal. Rptr. at 63; see also *People v. Buono*, 191 Cal. App. 2d 203, 224, 12 Cal. Rptr. 604, 616 (1961) (holding that overt acts in a conspiracy to commit murder included meetings and furnishing the knife).

an attempt to commit the offense or to aiding and abetting.<sup>88</sup> Moreover, it is unnecessary for each conspirator to perform an overt act because an overt act committed by any one of conspirators can consummate the conspiracy.<sup>89</sup> As the court in *People v. Corica* elaborated:

To render him guilty, it is not necessary that a conspirator perform some act which is in itself unlawful in carrying out the criminal conspiracy. If there is a conspiracy to commit murder by means of poison sent through the mail, a conspirator may not escape responsibility because he only agreed to and did purchase the postage stamps with which the poison is sent to the victim, an act entirely lawful in itself, but punishable if done under an agreement among the conspirators and in carrying out the unlawful purpose of the conspiracy.<sup>90</sup>

Even discussions and arrangements among conspirators can constitute properly chargeable overt acts in a criminal conspiracy prosecution. In *Von Villas*, the court defined the term "overt act" as an "outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime."<sup>91</sup> Noting that "outward" referred to any "tangible acts that manifest a criminal intention," the court concluded that partaking in arrangements, discussions, and preparations for the criminal act adequately met this definition.<sup>92</sup> By performing these "outward" acts, the conspirators have ventured beyond a mere criminal intention and forgone the opportunity to reconsider.<sup>93</sup>

*b. unanimity of jury verdict not required*

Sometimes there is no doubt that a conspiracy exists, but the jury cannot decide as to who did what or exactly what constitutes the overt act. For example, consider a situation in which a jury can

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88. See *Sconce*, 228 Cal. App. 3d at 700, 279 Cal. Rptr. at 63.

89. See *Russo*, 25 Cal. 4th at 1135, 25 P.3d at 648, 108 Cal. Rptr. 2d at 444; *Robinson*, 43 Cal. 2d at 140, 271 P.2d at 870.

90. 55 Cal. App. 2d 130, 134, 130 P.2d 164, 167 (1942).

91. *Von Villas*, 11 Cal. App. 4th at 244-45, 15 Cal. Rptr. 2d at 154.

92. *Id.*

93. See *id.*

reasonably conclude that the defendant conspired with *someone* to commit murder, but the identity of the co-conspirator is unclear due to mutual finger-pointing between the remaining defendants. Moreover, the doubt extends to who committed the overt act and the nature of overt act, even though it is certain that *some* overt act was committed by *some* conspirator in furtherance of the conspiracy.<sup>94</sup> This scenario raises a question of whether the jury must unanimously agree on a specific overt act, or whether it is sufficient if the jury agrees there was such act.

In *People v. Russo*, the California Supreme Court held that “the jury need not agree on a *specific* overt act as long as it unanimously finds beyond a reasonable doubt that some conspirator committed *an* overt act in furtherance of the conspiracy.”<sup>95</sup> In doing so, it struck down the defendant’s argument that because the overt act requirement is an “element” of the crime of conspiracy, a specific unanimity instruction is required.<sup>96</sup> The court stated that although “it would be unacceptable [to convict a person] if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another . . . unanimity as to exactly how [a single] crime was committed is not required.”<sup>97</sup> In *Russo*, because there was only one conspiracy, whether the overt act occurred in one of several possible manners “only concerns the way in which the crime was committed . . . not whether discrete crimes were committed.”<sup>98</sup> Therefore, even “if the jurors disagreed as to what overt act was committed, and agreed that *an* overt act was committed, they would

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94. These facts are taken from *Russo*, 25 Cal. 4th at 1136, 25 P.2d at 648, 108 Cal. Rptr. 2d at 446.

95. *Id.* at 1128, 25 P.3d at 643, 108 Cal. Rptr. 2d at 438 (emphasis added).

96. The requirement of unanimity as to the criminal act stems from the concern that a jury may amalgamate evidence of multiple offenses to convict a defendant even though there is no single offense which all the jurors agree the defendant committed. See *People v. Sutherland*, 17 Cal. App. 4th 602, 612, 21 Cal. Rptr. 2d 752, 757 (1993).

97. *Russo*, 25 Cal. 4th at 1135, 25 P.3d at 647, 108 Cal. Rptr. 2d at 444; *People v. Vargas*, 91 Cal. App. 4th 506, 558, 110 Cal. Rptr. 2d 210, 245 (2001) (reiterating that “a requirement of jury unanimity typically applies to acts that could have been charged as separate offenses.”).

98. *Russo*, 25 Cal. 4th at 1135, 25 P.3d at 647, 108 Cal. Rptr. 2d at 444.

still have unanimously found defendant guilty of a particular conspiracy.”<sup>99</sup>

*c. timing*

Generally, one who joins a conspiracy after its formation is a conspirator equally liable as those who originated it.<sup>100</sup> It does not matter whether a defendant actually started to conspire with another on the date when the conspiracy was alleged to have started, as long as there was active conspiratorial involvement by the defendant thereafter.<sup>101</sup> However, “[a] conspirator cannot be held liable for a substantive offense committed pursuant to the conspiracy if the offense was committed *before* he joined the conspiracy.”<sup>102</sup> Thus, a post-murder act cannot be in furtherance of a charged conspiracy to commit murder because its object was already achieved.<sup>103</sup>

4. Requisite plurality

*a. general rule—concurrence of at least two parties*

Criminal conspiracy requires the “proscribed concurrence of at least two parties.”<sup>104</sup> It follows that in “cases where only two persons are involved and one is a government agent or informer, the other cannot be convicted of conspiracy,” because the government

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99. *Id.*

100. *See* *People v. Anderson*, 90 Cal. App. 2d 326, 335, 202 P.2d 1044, 1050 (1949) (holding that where a third party joins a conspiracy that had been previously formed, “such person adopts and ratifies all of the prior acts done pursuant to the original conspiracy.”).

101. *See id.* at 334, 202 P.2d at 1050.

102. *People v. Marks*, 45 Cal. 3d 1335, 1345, 756 P.2d 260, 267, 248 Cal. Rptr. 874, 881 (1988); *see also* Rollin M. Perkins, *The Act of One Conspirator*, 26 HASTINGS L.J. 337, 344–45 (1974).

103. *See Marks*, 45 Cal. 3d at 1345, 756 P.2d at 267, 248 Cal. Rptr. at 880–81.

104. *People v. Superior Court (Jackson)*, 44 Cal. App. 3d 494, 498, 118 Cal. Rptr. 702, 704 (1975); *see* CAL. PENAL CODE § 182 (West 1999). This contrasts with the Model Penal Code’s “unilateral” approach, which focuses on the culpable party’s intent and does not require at least two guilty conspirators. *See* MODEL PENAL CODE § 5.03 cmt. 2(b) (Official Draft and Revised Comments 1985).

agent would not have the requisite criminal specific intent.<sup>105</sup> However, when a conspiracy involves more than two people, “the feigned participation of a false coconspirator or government agent” does not necessarily negate criminal liability.<sup>106</sup> As long as there are at least two co-conspirators whose mutual adherence to the common plan is genuine, the fact that one member in a group of alleged co-conspirators secretly does not or legally cannot intend to commit the target crime does not prevent a conspiracy conviction against the others.<sup>107</sup>

*b. rule of consistency abandoned*

The rule of consistency follows the requisite plurality principle by invalidating convictions where one of only two alleged conspirators has been acquitted.<sup>108</sup> Because it takes at least two people to conspire, a conviction for conspiracy would be inconsistent with a verdict of not guilty for the other alleged co-conspirator. Under this rule, if all but one of the conspirators were acquitted of a conspiracy to commit murder, liability cannot attach to the remaining defendant for consistency. However, many jurisdictions, including California, have largely abandoned the rule of consistency that once reconciled separate verdicts in conspiracy cases.<sup>109</sup> The courts accept the reality that such incongruities are built into the criminal justice system and fear that “any rule demanding greater consistency would inappropriately allow a defendant to exploit an erroneous acquittal.”<sup>110</sup>

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105. *People v. Liu*, 46 Cal. App. 4th 1119, 1128, 54 Cal. Rptr. 2d 578, 583 (1996) (citations omitted).

106. *Id.* at 1131, 54 Cal. Rptr. 2d at 584.

107. *See id.*

108. *See* MARCUS, *supra* note 23, § 2.03.

109. *See* Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CAL. L. REV. 1423, 1429 (2001).

110. *Id.*; *see also* *People v. Palmer*, 24 Cal. 4th 856, 860, 15 P.3d 234, 236, 103 Cal. Rptr. 2d 13, 15 (2001) (“[T]he law generally accepts inconsistent verdicts as an occasionally inevitable, if not entirely satisfying, consequence of a criminal justice system that gives defendants the benefit of a reasonable doubt as to guilt. . .”).



Before the rule of consistency was abandoned in California, there were already substantial limitations to its application.<sup>111</sup> For example, there was no inconsistency when a defendant was convicted of conspiracy where no co-conspirators were formally charged.<sup>112</sup> Moreover, the rule did not apply where the conspirators were tried in separate trials.<sup>113</sup> When faced with whether the rule of consistency applied in joint trials, the California Supreme Court decided to dispose of the rule altogether.<sup>114</sup> In *People v. Palmer*, the court concluded that the rule of consistency is "a vestige of the past" and held that consistent verdicts are not required in joint trials for conspiracy.<sup>115</sup> Consequently, if the defendant does not claim that the conspiracy conviction lacks evidentiary support, a court can affirm his conviction for conspiracy to commit murder despite the co-defendant's acquittal by another jury on that charge.<sup>116</sup>

### *B. Scope of Conspirator's Liability*

#### *1. Single vs. multiple conspiracies*

It is often vitally important whether the parties have made several small agreements or a single all-encompassing agreement. Because each agreement constitutes a separate conspiracy and each conspiracy may be separately punished, the prosecution may attempt to impose multiple punishments on members of a single conspiracy by alleging multiple conspiracies.<sup>117</sup> Conversely, the prosecution may desire to secure the advantages of establishing a single conspiracy.<sup>118</sup> One important advantage is that certain evidence which is admissible against one conspirator is also admissible against

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111. See MARCUS, *supra* note 23, § 2.03.

112. See *People v. Sagehorn*, 140 Cal. App. 2d 138, 146, 294 P.2d 1062, 1067 (1956) (upholding conviction when other persons not apprehended are found to be co-conspirators).

113. See *People v. Holzer*, 25 Cal. App. 3d 456, 460, 102 Cal. Rptr. 11, 13 (1972).

114. See *Palmer*, 24 Cal. 4th 856, 15 P.3d 234, 103 Cal. Rptr. 2d 13.

115. *Id.* at 858, 15 P.3d at 235, 103 Cal. Rptr. 2d at 14.

116. See *id.* at 866-67, 15 P.3d at 242, 103 Cal. Rptr. 2d at 20.

117. See *Harvard Developments*, *supra* note 27, at 991.

118. See *id.*

all other participants in the conspiracy.<sup>119</sup> For example, the prosecution may invoke the co-conspirator exception to the hearsay rule to admit evidence against defendants that would otherwise be inadmissible.<sup>120</sup> Similarly, acts of one conspirator may eliminate statute of limitations claims, and all parties may be held substantively responsible for the crimes of each defendant.<sup>121</sup> Alleging a single conspiracy also enables the prosecution to join multiple parties for a single trial in locations where venue would be improper were they participants in a second conspiracy.<sup>122</sup>

The general test employed by courts to determine whether a single conspiracy has been formed is "whether there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy."<sup>123</sup> If each separate agreement had its own distinct, illegal end, and no overall comprehensive plan could be shown, it would be improper to consolidate these conspiracies into one count.<sup>124</sup> On the other hand, if the acts were merely steps or stages in the formation of a larger all-inclusive conspiracy directed at achieving a single unlawful result, then there is a single conspiracy.<sup>125</sup>

For instance, in *People v. Elliot*, the defendant was charged with a single conspiracy based on a series of overt acts that occurred over an extended period of time with different actors.<sup>126</sup> The court concluded that an overall comprehensive plan was lacking and that the single "conspiracy charged was in reality a series of conspiracies . . . ."<sup>127</sup> In contrast, *People v. Vargas* held that "a

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119. See discussion *infra* Section E, The Co-Conspirator Exception.

120. See CAL. EVID. CODE § 1223 (West 2001); *United States v. Townsend*, 924 F.2d 1385, 1388 (7th Cir. 1991); *People v. Hardy*, 2 Cal. 4th 86, 139, 825 P.2d 781, 808–09, 5 Cal. Rptr. 2d 796, 823–24 (1992).

121. See MARCUS, *supra* note 23, § 4.02.

122. See *Harvard Developments*, *supra* note 27, at 991.

123. *People v. Vargas*, 91 Cal. App. 4th 506, 555, 110 Cal. Rptr. 2d 210, 243 (2001) (citing *People v. Skelton*, 109 Cal. App. 3d 691, 718, 167 Cal. Rptr. 636, 650 (1980)).

124. See *People v. Elliot*, 77 Cal. App. 3d 673, 685, 144 Cal. Rptr. 137, 142–43 (1978).

125. See *People v. Liu*, 46 Cal. App. 4th 1119, 1133, 54 Cal. Rptr. 2d 578, 586 (1996) (citing *Blumenthal v. United States*, 332 U.S. 539, 558–59 (1947)).

126. See *Elliot*, 77 Cal. App. 3d at 682, 144 Cal. Rptr. at 141.

127. *Id.* at 685, 144 Cal. Rptr. at 142–43.

single agreement to commit a number of crimes is only one conspiracy, regardless of the number of crimes sought to be committed . . . under that conspiracy.”<sup>128</sup> Using a multi-factor analysis<sup>129</sup> to determine whether the crimes were pursuant to an overall scheme, the court decided that the murder ordered by the defendant did not evidence a separate conspiracy from the overriding conspiracy with which defendant and others were charged (namely, conspiracy to establish a criminal street gang to commit murder, robbery, burglary, extortion, and drug trafficking).<sup>130</sup>

There is some disagreement on whether individual murders necessarily give rise to separate conspiracies. Whereas some courts recognize that defendants can at times be engaged in a conspiracy of dimensions far broader than the individual murders with which they were charged,<sup>131</sup> others maintain that “[e]ach separately planned murder is the goal of a separate conspiracy.”<sup>132</sup>

In *People v. Liu*, the defendant was convicted of two counts of conspiracy to commit murder.<sup>133</sup> He argued that one of the convictions should be reversed because the two murders were part of a single all-inclusive conspiracy to kidnap and murder one of the victims. The court disagreed, stating that the rule to determine whether the acts are merely steps in the formation of a more general

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128. *Vargas*, 91 Cal. App. 4th at 555, 110 Cal. Rptr. 2d at 243.

129. The factors are: “(1) the nature of the scheme; (2) the identity of the participants; (3) the quality, frequency, and duration of each conspirator’s transactions; and (4) the commonality of times and goals.” *Id.* at 554, 110 Cal. Rptr. 2d at 242.

130. *See id.* at 549–56, 110 Cal. Rptr. 2d at 238–44.

131. *See id.* at 550, 110 Cal. Rptr. 2d at 239 (finding that the commission of specific crimes, including murder, were all in pursuance of the overriding purpose of establishing the criminal gang); *see also* *People v. Remiro*, 89 Cal. App. 3d 809, 153 Cal. Rptr. 89 (1979) (finding that slaying of victim was only a step in a planned series of terrorist activities designed to accomplish the Symbionese Liberation Army’s avowed goal of fomenting a violent upheaval within American society in order to effect revolutionary change). In *People v. Manson*, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976), the court found that the objective of the conspiracy was the realization of Manson’s fanatical dream of a racial war, a cataclysm he referred to as “Helter Skelter.” The court stated: “Boundaries of a conspiracy are not limited by the substantive crimes committed in furtherance of the agreement.” *Id.* at 155, 132 Cal. Rptr. at 295.

132. *Liu*, 46 Cal. App. 4th at 1133, 54 Cal. Rptr. 2d at 586; *see* *People v. McLead*, 225 Cal. App. 3d 906, 920, 276 Cal. Rptr. 187, 196 (1990).

133. *See Liu*, 46 Cal. App. 4th at 1133, 54 Cal. Rptr. 2d at 586.

conspiracy “does not apply where the several different criminal acts are separate murders of different individuals, even if the separate murders are incidental to a single objective.”<sup>134</sup> It reasoned that a conspiracy to commit several murders is a more serious wrong than a conspiracy to commit a single murder, “no matter the extent to which the several murders are planned for the accomplishment of a single criminal purpose.”<sup>135</sup>

Like *Liu*, the court in *People v. McLead* concluded that there was a separate conspiracy corresponding to each murder.<sup>136</sup> However, the *McLead* court rejected the theory that there are as many conspiracies as there are victims per se.<sup>137</sup> Instead, the court adopted an intermediate approach and noted that the existence of multiple victims is only one factor in deciding the number of conspiracies.<sup>138</sup> More recently, the court in *People v. Vargas* tried to distinguish *Liu*’s holding by explaining that the *Liu* court only affirmed the separate convictions “because it did not find an overriding conspiracy subsuming the two murders.”<sup>139</sup> Whether this is adequate to reconcile the two positions remains to be seen. Nonetheless, most courts agree that the question of whether there are single or multiple conspiracies is not one of fact, and the trial court need not submit it to the jury for determination.<sup>140</sup>

## 2. Vicarious liability for substantive offenses of co-conspirators

In California, a conspirator is liable for an act of a co-conspirator, not only when such an act was a part of the original plan, but also when it was a natural and probable consequence of

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134. *Id.* at 1133, 54 Cal. Rptr. 2d at 586.

135. *Id.*

136. *See Mclead*, 225 Cal. App. 3d at 920, 276 Cal. Rptr. at 196.

137. *See id.*

138. Other relevant factors include “whether the crimes involved the same motives, were to occur in the same time and place and by the same means.” *Id.*

139. *Vargas*, 91 Cal. App. 4th at 556, 110 Cal. Rptr. 2d at 243.

140. *See Liu*, 46 Cal. App. 4th at 1133, 54 Cal. Rptr. 2d at 586; *McLead*, 225 Cal. App. 3d at 921, 276 Cal. Rptr. at 196; *cf. Vargas*, 91 Cal. App. 4th at 554, 110 Cal. Rptr. 2d at 242 (“A trial court is required to instruct the jury to determine whether a single or multiple conspiracies exist only when there is evidence to support alternative findings.”).

carrying out the plan.<sup>141</sup> This is consistent with the well-known Pinkerton Doctrine under federal conspiracy law.<sup>142</sup> The co-conspirator liability/Pinkerton Doctrine implicitly recognizes the greater threat of criminal agency and explicitly seeks to deter criminal combination by recognizing that the act of one is an act of all.<sup>143</sup>

The rationale makes the most sense when the conspiratorial objects being contemplated contain a high risk of collateral damage. In other words, when people conspire to commit crimes of a nature that would probably result in the taking of human life, it must be presumed that they all understand the consequences that might

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141. See *People v. Kauffman*, 152 Cal. 331, 334, 92 P. 861, 862 (1997) ("The general rule is well settled that where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine." (citations omitted)); *People v. Superior Court (Shamis)*, 58 Cal. App. 4th 833, 842-43, 68 Cal. Rptr. 2d 388, 393 (1997) ("The doctrine of conspiracy plays a dual role in our criminal law. First, conspiracy is a substantive offense in itself . . . . Second, proof of a conspiracy serves to impose criminal liability on all conspirators for crimes committed in furtherance of the conspiracy." (citations omitted)); *People v. Luparello*, 187 Cal. App. 3d 410, 437, 231 Cal. Rptr. 832, 847 (1986); see also CALJIC, *supra* note 2, § 6.11:

Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if that act or declaration is in furtherance of the object of the conspiracy.

The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators.

[A member of a conspiracy is not only guilty of the particular crime that to [his][her] knowledge [his][her] confederates agreed to and did commit, but is also liable for the natural and probable consequences of any [crime] [act] of a co-conspirator to further the object of the conspiracy, even though that [crime] [act] was not intended as a part of the agreed upon objective and even though [he] [she] was not present at the time of the commission of that [crime] [act]. . . .]

142. See *United States v. Pinkerton*, 328 U.S. 640, 647 (1946) (holding that co-conspirators can be liable for the substantive crimes committed by members of the conspiracy to the extent those offenses were reasonably foreseeable); cf. MODEL PENAL CODE § 2.06 cmt. 6(a) (Official Draft and Revised Comments 1985) (rejecting conspiracy as "a basis of complicity in substantive offenses committed in furtherance of its aims").

143. See *Pinkerton*, 328 U.S. at 647; *Luparello*, 187 Cal. App. 3d at 437, 231 Cal. Rptr. at 847.

reasonably follow from carrying out such plans and have assented to the taking of human life if necessary to accomplish the object of the conspiracy.<sup>144</sup> Thus, all the conspirators, not just those who do the actual killing, are equally guilty of any homicide that is the natural and probable consequence of their criminal enterprise.<sup>145</sup> This is so even if a homicide is not directly contemplated by the conspirators.<sup>146</sup>

However, a conspirator is not liable for the act of a co-conspirator where such an act is entirely unrelated to the common plan or is a product of individual malice.<sup>147</sup> In *People v. Kauffman*, the court explained that where one member of the party departs from the original unlawful design and commits an act which is neither in furtherance nor the natural or legitimate consequence of an attempt to attain that conspiratorial object, that member would alone be responsible for his acts.<sup>148</sup> According to the same logic, it would not make sense to extend liability for an act that is actually forbidden and

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144. See, e.g., *People v. Brown*, 59 Cal. 345, 354 (1881) (affirming conviction of first-degree murder); *People v. Alexander*, 140 Cal. App. 3d 647, 662, 189 Cal. Rptr. 906, 914 (1983) (each act or statement in the perpetration of crime is imputed to all of the conspirators); *People v. Johnson*, 33 Cal. App. 3d 9, 21–22, 108 Cal. Rptr. 671, 679 (1973) (stating that once it was conceded that the defendant was engaged in a conspiracy with the co-defendant to rob the shop owner, it became immaterial whether homicide was part of the common plan); *People v. Pedde*, 25 Cal. App. 34, 43–44, 142 P. 894, 897 (1914) (affirming conviction of assault with intent to commit murder); 17 CAL. JUR. 3D, *Criminal Law: Crimes Against the Person* § 9 (2002).

145. See *People v. Morante*, 20 Cal. 4th 403, 417, 975 P.2d 1071, 1080, 84 Cal. Rptr. 2d 665, 674 (1999) (“[I]t is not necessary that a party to a conspiracy shall be present and personally participate . . . in all or any of the overt acts.”); *People v. Harper*, 25 Cal. 2d 862, 871–72, 156 P.2d 249, 254–55 (1945); *People v. Bringhurst*, 192 Cal. 748, 751, 221 P. 897, 898 (1923); *People v. Cabalero*, 31 Cal. App. 2d 52, 57, 87 P.2d 364, 366–67 (1939); *People v. Jones*, 136 Cal. App. 722, 727–28, 29 P.2d 902, 904–05 (1934).

146. See *People v. Cowan*, 38 Cal. App. 2d 231, 245, 101 P.2d 125, 133 (1940); see also CALJIC, *supra* note 2, § 8.26 (In a felony-murder where killing is done in pursuance of a conspiracy, “all of the co-conspirators are equally guilty of murder of the first degree” whether the killing is intentional, unintentional, or accidental.).

147. See *Kauffman*, 152 Cal. at 334, 92 P. at 862.

148. See *id.*; CALJIC, *supra* note 2, § 6.16.

cannot be anticipated as a probable and natural consequence of the agreement.<sup>149</sup>

Finally, the question of whether an act is a natural and probable consequence of carrying out the common plan or whether it is entirely unrelated is for the jury to resolve.<sup>150</sup>

### C. Duration/Termination

The point at which a conspiracy terminates is important for many reasons. First, a continuing conspiracy may allow for more overt acts at different locations, which in turn will afford the prosecution new choices for the place of trial.<sup>151</sup> The termination point also dictates whether additional persons joined the original conspiracy or a new one, whether the declaration of one conspirator will be admissible against other conspirators,<sup>152</sup> and whether the statute of limitations bars a conspiracy prosecution.<sup>153</sup>

The statute of limitations begins to run either when the defendant withdraws,<sup>154</sup> or when the conspiracy itself terminates.<sup>155</sup> A conspiracy terminates when the substantive crime for which the co-conspirators are being tried is either attained or defeated.<sup>156</sup> If all parties abandon the conspiracy before the successful attainment of the substantive offense (i.e., the primary object of the conspiracy), then the limitation period begins to run from the date the last overt act was alleged to have occurred in furtherance of the conspiracy.<sup>157</sup>

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149. See *People v. Garewal*, 173 Cal. App. 3d 285, 300, 218 Cal. Rptr. 690, 698 (1985); *Manson*, 61 Cal. App. 3d at 126, 132 Cal. Rptr. at 276.

150. See *People v. Superior Court (Quinteros)*, 13 Cal. App. 4th 12, 21–22, 16 Cal. Rptr. 2d 462, 467–68 (1993).

151. See LAFAVE & SCOTT, *supra* note 47, § 6.5(e).

152. In California, a conspirator's statements are admissible against his co-conspirators only when made *during* the conspiracy and in furtherance thereof. See *People v. Saling*, 7 Cal. 3d 844, 852, 500 P.2d 610, 615, 103 Cal. Rptr. 698, 703 (1972).

153. See LAFAVE & SCOTT, *supra* note 47, § 6.5(e).

154. See discussion *infra* Section D, Withdrawal.

155. See *Harvard Developments*, *supra* note 27, at 961.

156. See *Saling*, 7 Cal. 3d at 852, 500 P.2d at 615, 103 Cal. Rptr. at 703.

157. See *People v. Zamora*, 18 Cal. 3d 538, 546 n.4, 557 P.2d 75, 80 n.4, 134 Cal. Rptr. 784, 789 n.4 (1976).

Otherwise, the statute of limitations starts to run at the same time as the substantive offense itself.<sup>158</sup>

1. Death or arrest of a conspirator does not  
necessarily terminate conspiracy

A conspiracy cannot be deemed abandoned when there has already been an agreement and there remains some party still able to carry out the objective. For instance, a death of a conspirator in a two-person conspiracy is not enough to end the conspiracy for the co-conspirator.<sup>159</sup> In *People v. Alleyne*, two people conspired to kill, but one of them died before the other consummated the plan.<sup>160</sup> The issue was whether the death of a co-conspirator before an overt act occurred would terminate the conspiracy. The court concluded that the co-conspirator's death terminated his life but not the agreement.<sup>161</sup> Because there was an agreement to kill, all that was left to make the agreement punishable was the defendant's perpetration of an overt act in furtherance of the agreement.<sup>162</sup> The defendant's act of killing was the last requisite element that established his culpability.<sup>163</sup> Moreover, a conspirator's arrest or imprisonment does not terminate the conspiracy with respect to him as a matter of law.<sup>164</sup> In *People v. Cooks*, the court held that the withdrawal of a conspiracy presents a question of fact, and the jury must decide whether the alleged conspirator still concurred in the general objective of the conspiracy after his arrest.<sup>165</sup>

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158. See *Parnell v. Superior Court*, 119 Cal. App. 3d 392, 410, 173 Cal. Rptr. 906, 916–17 (1981).

159. See *People v. Alleyne*, 82 Cal. App. 4th 1256, 1260–61, 98 Cal. Rptr. 2d 737, 740 (2000).

160. See *id.*

161. See *id.* at 1262, 98 Cal. Rptr. 2d at 741.

162. See *id.*

163. See *id.*

164. See *People v. Cooks*, 141 Cal. App. 3d 224, 278, 190 Cal. Rptr. 211, 251 (1983).

165. See *id.* at 316, 190 Cal. Rptr. at 278; see also *Saling*, 7 Cal. 3d at 852, 500 P.2d at 615, 103 Cal. Rptr. at 703 (stating that jury should determine precisely when the conspiracy ended).



## 2. Acts of concealment/extension beyond commission of a substantive crime

An act conducted for the mere purpose of concealing either the conspiracy or the substantive crime cannot extend the life of a conspiracy.<sup>166</sup> This rule is intended to prevent the indefinite prolonging of a conspiracy for steps taken to bury their traces and to avoid detection and punishment after accomplishing the central criminal purpose.<sup>167</sup> However, there may be situations where the conspiracy will be "deemed to have extended beyond the substantive crime to activities contemplated and undertaken by the conspirators in pursuance of the objectives of the conspiracy."<sup>168</sup> For instance, in *People v. Saling*, the prosecution sought to introduce statements made to a co-conspirator three days after the murder.<sup>169</sup> The court held that the statements were hearsay, but were nevertheless admissible as being made in furtherance of a conspiracy.<sup>170</sup> The conspiracy continued after the murder because one of the main objectives included obtaining payment for the defendant's participation, which had not occurred when the statements were made.<sup>171</sup>

The California Supreme Court has since narrowed the scope of the holding in *Saling* by emphasizing that, as a matter of law, not all conspiracies in which one conspirator is hired by another continue until the person hired is paid to his satisfaction.<sup>172</sup> For hearsay

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166. See *Saling*, 7 Cal. 3d at 852, 500 P.2d at 615, 103 Cal. Rptr. at 703 (citing *Krulewitch v. United States*, 336 U.S. 440 (1949)).

167. See *id.* at 854 n.9, 500 P.2d at 616, 190 Cal. Rptr. at 704 n.9 (citing *Grunewald v. United States*, 353 U.S. 391, 405 (1957)).

168. *Id.* at 852, 500 P.2d at 615, 190 Cal. Rptr. at 703; see also *People v. Brown*, 131 Cal. App. 2d 643, 656-57, 281 P.2d 319, 328 (1955) (illustrating examples to include: division of loot, payment for participation in the crime, and acts contemplating escaping punishment); cf. *People v. Tinnin*, 136 Cal. App. 301, 306, 28 P.2d 951, 953-54 (1934) (finding that conspiracy deemed still operative when defendant tried to escape punishment for murder by making death appear accidental).

169. See *Saling*, 7 Cal. 3d at 851, 500 P.2d at 614-15, 103 Cal. Rptr. at 702-03.

170. See *id.* at 851-52, 500 P.2d at 614-15, 103 Cal. Rptr. at 702-03.

171. See *id.* at 851-52, 500 P.2d at 615, 103 Cal. Rptr. at 703.

172. See *People v. Leach*, 15 Cal. 3d 419, 432, 541 P.2d 296, 304, 124 Cal. Rptr. 752, 760 (1975).

evidence to be admissible under the co-conspirator exception, independent evidence of a continuing conspiracy is required.<sup>173</sup> In *People v. Leach*, for example, the court cautioned that conspiracy to commit murder does not necessarily entail a second conspiracy to collect the insurance proceeds to be paid upon successfully committing the contemplated offense.<sup>174</sup> In contrast, where evidence reveals that the goal of the conspiracy is to obtain money through the receipt of insurance benefits for the life of the insured, the conspiracy does not end with the death of the insured.<sup>175</sup> Instead, the conspiracy continues until the conspirators receive the insurance proceeds, or until the beneficiary of the policy is convicted of unjustifiable homicide and thus rendered ineligible to collect.<sup>176</sup> A survey of these decisions reveals the tension between the prosecution's interest in lengthening the duration of the crime and the danger of extending the conspiracy doctrine too far.<sup>177</sup>

#### D. Withdrawal

Withdrawal from a conspiracy may act as a defense in several contexts. For example, a defendant may assert a withdrawal to avoid liability for substantive crimes subsequently committed by other conspirators.<sup>178</sup> Another possibility is that a defendant may rely upon his withdrawal as a means of limiting the admissibility of the subsequent acts and declarations of the other conspirators against him.<sup>179</sup> Additionally, under California law, withdrawal serves as a complete defense to conspiracy if the withdrawal is accomplished

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173. See *id.* at 432, 541 P.2d at 304, 124 Cal. Rptr. at 760.

174. See *id.* at 434, 541 P.2d at 305–06, 124 Cal. Rptr. at 761–62.

175. See *People v. Hardy*, 2 Cal. 4th 86, 143–44, 825 P.2d 781, 811–12, 5 Cal. Rptr. 2d 796, 826–27 (1992).

176. See *id.* at 144, 825 P.2d at 812, 5 Cal. Rptr. at 826–27.

177. See *id.* (recognizing Justice Jackson's frequently cited admonition in *Krulewitch*, 336 U.S. at 449, that “the looseness and pliability of the doctrine [of conspiracy] present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case.”); John Bilyeu Oakley, *From Hearsay to Eternity: Pendency and the Co-Conspirator Exception in California—Fact, Fiction, and a Novel Approach*, 16 SANTA CLARA L. REV. 1, 2–10 (1975).

178. See *People v. Sconce*, 228 Cal App. 3d 693, 702, 279 Cal. Rptr. 59, 64 (1991); LAFAYE & SCOTT, *supra* note 47, § 6.5(e).

179. See LAFAYE & SCOTT, *supra* note 47, § 6.5(e).

before the commission of an overt act.<sup>180</sup> Conversely, once an overt act is committed in furtherance of the conspiracy, the crime of conspiracy becomes completed and no subsequent action can exonerate the conspirator of that crime.<sup>181</sup>

Requiring an overt act before conspirators can be prosecuted and punished is said to provide a *locus poenitentiae*—an opportunity for reconsideration or termination of agreement.<sup>182</sup> The purpose of this rule is to encourage the conspirator to abandon the conspiracy prior to attaining its specific object, and thereby weaken the group that he entered.<sup>183</sup> Because this rationale should continue to apply after the commission of an overt act that is not itself a substantive crime, commentators disagree about the wisdom of choosing the first overt act as the *locus poenitentiae*.<sup>184</sup> Nevertheless, the rule in California remains that once an overt act has been committed, withdrawal no longer serves as an affirmative defense to the initial act of conspiracy.<sup>185</sup>

### 1. Burden of proof

A defendant's participation in the conspiracy, once established, is presumed to continue unless he can prove that he effectively withdrew from the conspiracy.<sup>186</sup> Therefore, the burden of proof is on the defendant to prove that he affirmatively withdrew from or

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180. See *Sconce*, 228 Cal. App. 3d at 701–02, 279 Cal. Rptr. at 63–64 (stating that withdrawal after an overt act “merely precludes liability for subsequent acts committed by members of the conspiracy,” and does not relate back to the criminal formation of the unlawful combination).

181. See *id.* at 702, 279 Cal. Rptr. at 64.

182. See *id.* at 701, 279 Cal. Rptr. at 64.

183. See *Harvard Developments*, *supra* note 27, at 957.

184. See *id.*; LAFAVE & SCOTT, *supra* note 47, at 559; see also MODEL PENAL CODE § 5.03(6) (Official Draft and Revised Comments 1985) (recognizing a defense that it refers to as renunciation, which is not available in California).

185. See *Sconce*, 228 Cal. App. 3d at 702, 279 Cal. Rptr. at 64. “[W]ithdrawal avoids liability only for the target offense, or for any subsequent act committed by a co-conspirator in pursuance of the common plan. ‘[i]n respect of the conspiracy itself, the individual’s change of mind is ineffective; he cannot undo that which he has already done.’” *Id.* (citations omitted).

186. See *People v. Belmontes*, 45 Cal. 3d 744, 791, 755 P.2d 310, 335, 248 Cal. Rptr. 126, 151–52 (1988).

repudiated his role in the conspiracy.<sup>187</sup> ““It is not part of the People’s prima facie case to negate the possibility of such a withdrawal.””<sup>188</sup> Similar to termination, withdrawal from a conspiracy is a question of fact.<sup>189</sup> “Although a defendant’s arrest and incarceration may terminate his participation in an alleged conspiracy, his arrest does not terminate, or constitute a withdrawal from, the conspiracy as a matter of law.”<sup>190</sup>

## 2. Communication necessary for effective withdrawal

To effectively withdraw from a conspiracy, a conspirator must do more than merely cease participating; he must communicate to the other conspirators “an affirmative and bona fide rejection or repudiation of the conspiracy.”<sup>191</sup> In *People v. Beaumaster*, the defendant’s conspiracy conviction for assault with intent to commit murder was sustained even though he complied with police orders before any shooting occurred and his partner was the person who fired the actual shots.<sup>192</sup> The court found that although the defendant cooperated with the police, he had not communicated any withdrawal to his co-defendant.<sup>193</sup> In fact, he handed the gun used in the shooting to the co-defendant.<sup>194</sup> Furthermore, the court concluded that the defendant’s abandonment was inadequate to constitute withdrawal because it was not a free and voluntary act.<sup>195</sup> There is no effective withdrawal where the abandonment is prompted by threatened arrest or the appearance of police.<sup>196</sup>

Another related issue is how much notice is necessary for an effective withdrawal. The court in *Loser v. Superior Court of*

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187. *See id.*

188. *Id.* (quoting *People v. Crosby*, 58 Cal. 2d 713, 731, 375 P.2d 839, 850, 25 Cal. Rptr. 847, 858 (1962)).

189. *See Sconce*, 228 Cal. App. 3d at 701, 279 Cal. Rptr. at 63.

190. *Id.*

191. *Id.*; *see* CALJIC, *supra* note 2, § 6.20 (“In order to effectively withdraw from a conspiracy, there must be an affirmative and good faith rejection or repudiation of the conspiracy which must be communicated to the other conspirators of whom [he][she] has knowledge.”).

192. *See* 17 Cal. App. 3d 996, 1003, 95 Cal. Rptr. 360, 364 (1971).

193. *See id.* at 1004, 95 Cal. Rptr. at 364.

194. *See id.* at 1004, 95 Cal. Rptr. at 364–65.

195. *See id.* at 1004, 95 Cal. Rptr. at 364.

196. *See id.* at 1003, 95 Cal. Rptr. at 364.

*Alameda County* held that such withdrawal requires an "affirmative act bringing home the fact of his withdrawal to his confederates," in time for them to also abandon the scheme.<sup>197</sup> In addition, the court suggested that notice is insufficient unless it is given to all of the other conspirators.<sup>198</sup> This position has never been explicitly overruled, but it has been criticized for being too restrictive.<sup>199</sup> The trend in more recent decisions seems to favor a more flexible standard that relieves the defendant of the duty to actually notify each and every co-conspirator of his intentions, as long as he made a reasonable attempt to do so.<sup>200</sup>

Finally, withdrawing from a conspiracy requires less effort than withdrawing as an aider and abettor, which calls for a defendant to notify his accomplices *and* do "everything in his power to prevent commission of the crime."<sup>201</sup> The latter approach is similar to that of the Model Penal Code, which recognizes an affirmative defense to the crime of conspiracy if the defendant thwarts "the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."<sup>202</sup> However,

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197. 78 Cal. App. 2d 30, 32, 177 P.2d 320, 321 (1947); see 1 WITKIN & EPSTEIN, *supra* note 21, § 92; *Harvard Developments*, *supra* note 27, at 958.

198. See 1 WITKIN & EPSTEIN, *supra* note 21, § 92.

199. See *Harvard Developments*, *supra* note 27, at 958 ("[T]he courts have gone beyond the rationale of notification. It appears sufficient that the defendant reasonably expected his withdrawal to be communicated to the rest of his associates by those whom he informed; to require him personally to contact all members seems too harsh.").

200. See, e.g., *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (holding that an instruction stating the defendant could withdraw only by either notifying every member of the conspiracy of his withdrawal or notifying authorities of the illegal scheme is unnecessarily confining and constituted reversible error). "Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." *Id.* at 464-65. Compare *Loser*, 78 Cal. App. 2d at 32, 177 P.2d at 321 (using word "confederates" to indicate that notice of withdrawal must be given to every co-conspirator), with *People v. Crosby*, 58 Cal. 2d 713, 730, 375 P.2d 839, 850, 25 Cal. Rptr. 847, 858 (1962) (stating that "there must be . . . [a] rejection or repudiation . . . communicated to the co-conspirators").

201. *People v. Jackson*, 13 Cal. 4th 1164, 1221, 920 P.2d 1254, 1286, 56 Cal. Rptr. 2d 49, 81 (1996) (citations omitted).

202. MODEL PENAL CODE § 5.03(6).

California courts rejected “renunciation” as a complete defense to the conspiracy.<sup>203</sup> Thus, although a conspirator can withdraw by simply informing the others of his intentions (thereby releasing himself from any subsequent vicarious liability), going the extra step (by trying to prevent the commission of the object offense) will not absolve him of the conspiracy charge itself, once an overt act is committed.<sup>204</sup>

### *E. The Co-Conspirator Exception*

It is generally agreed that one of the chief advantages of the conspiracy charge for the prosecution is that statements of one conspirator are admissible against all co-conspirators.<sup>205</sup> Section 1223 of the California Evidence Code codified the long-established “co-conspirator exception” to the hearsay rule,<sup>206</sup> making hearsay statements by co-conspirators admissible against a party “if, at the threshold, the offering party presents ‘independent evidence to establish prima facie the existence of . . . [a] conspiracy.’”<sup>207</sup> Once proof of a conspiracy has been demonstrated, three preliminary facts must be established:

‘(1) that the declarant was participating in a conspiracy at the time of the declaration; (2) that the declaration was in

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203. See *Sconce*, 228 Cal. App. 3d at 702–03 n.4, 279 Cal. Rptr. at 64 n.4.

204. See *id.* at 702, 279 Cal. Rptr. at 64.

205. See Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back From an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 25 (1992); see also *People v. Cooks*, 141 Cal. App. 3d 224, 312, 190 Cal. Rptr. 211, 275 (1983) (“[O]nce the conspiracy is established it is not necessary to prove that each conspirator personally participated in each of several overt acts because members of a conspiracy are bound by all acts of all members committed in furtherance of the conspiracy.” (citations omitted)); *People v. Tinnin*, 136 Cal. App. 301, 306, 28 P.2d 951, 953 (1934) (finding that acts and declarations of one conspirator pursuant to or in furtherance of the conspiracy’s purpose are admissible in evidence against any member of the conspiracy).

206. See *People v. Leach*, 15 Cal. 3d 419, 428, 541 P.2d 296, 302, 124 Cal. Rptr. 752, 758 (1975).

207. *People v. Hardy*, 2 Cal. 4th 86, 139, 825 P.2d 781, 809, 5 Cal. Rptr. 2d 796, 824 (1992) (citations omitted); see also *People v. Herrera*, 83 Cal. App. 4th 46, 63, 98 Cal. Rptr. 2d 911, 922 (2000) (establishing that a prima facie showing of a conspiracy for the purposes of admissibility of a co-conspirator’s statement requires the proponent to proffer sufficient evidence to “allow the trier of fact to determine that the conspiracy exists by a preponderance of the evidence”).

furtherance of the objective of that conspiracy; and (3) that at the time of the declaration the party against whom the evidence is offered was participating or would later participate in the conspiracy.’<sup>208</sup>

### 1. Independent proof of conspiracy

California courts require “that the existence of the conspiracy be established by evidence independent of the proffered declaration.”<sup>209</sup> Although “the showing need only be prima facie evidence of the conspiracy,” the evidence “may be circumstantial, and may be by means of any competent evidence which tends to show that a conspiracy existed . . . including uncorroborated accomplice testimony.”<sup>210</sup> “[I]t is settled that only slight corroborative evidence is necessary to connect a defendant with the alleged conspiracy.”<sup>211</sup> In addition, “evidence of conspiracy may be admitted even if the defendant is not charged with the crime of conspiracy.”<sup>212</sup>

### 2. Requirement of furtherance

The requirement that the co-conspirator’s statement “must further the object of the conspiracy is broadly construed.”<sup>213</sup> Any statement that relates to the conspiracy usually furthers that conspiracy.<sup>214</sup>

For example, in *People v. Von Villas*, evidence of a calendar with a blackened out date that coincided with the murder victim’s disappearance was deemed in furtherance of the conspiracy and was

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208. *People v. Sanders*, 11 Cal. 4th 475, 516, 905 P.2d 420, 440, 46 Cal. Rptr. 2d 751, 771 (1995) (quoting *Hardy*, 2 Cal. 4th at 139, 825 P.2d at 809, 5 Cal. Rptr. 2d at 824).

209. *Herrera*, 83 Cal. App. 4th at 65, 98 Cal. Rptr. 2d at 923 (citing *Leach*, 15 Cal. 3d at 430, 541 P.2d at 303, 124 Cal. Rptr. at 759).

210. *People v. Rodriguez*, 8 Cal. 4th 1060, 1134, 885 P.2d 1, 40, 36 Cal. Rptr. 2d 235, 274 (1994) (citations omitted).

211. *Cooks*, 141 Cal. App. 3d at 312, 190 Cal. Rptr. at 275 (citing *People v. Harper*, 25 Cal. 2d 862, 876–77, 156 P.2d 249, 257 (1945)).

212. *Rodriguez*, 8 Cal. 4th at 1134, 885 P.2d at 40, 36 Cal. Rptr. 2d at 274.

213. *People v. Von Villas*, 11 Cal. App. 4th 175, 231, 15 Cal. Rptr. 2d 112, 145 (1992).

214. *See id.*

admissible hearsay evidence under section 1223.<sup>215</sup> Although the blackened calendar was found in the co-conspirator's home ten months after the date of the victim's disappearance, and nothing directly tied him to the act of blackening the date, the court concluded that there was a proper foundation to submit the exhibit to the jury under section 1223 as evidence against the defendant.<sup>216</sup> In *People v. Sanders*, the hearsay statement at issue was made by one of the defendants to her co-worker, telling her a robbery was going to occur that night.<sup>217</sup> There, the defendant argued that her statement, "Good thing I seen you today . . . [b]ecause they gonna [sic] rob Bob's Big Boy tonight, and I don't want you hurt," was not admissible because it was not made in furtherance of the conspiracy.<sup>218</sup> The court was not persuaded, deciding instead that the defendant made the statement to her co-worker "in order to remove her from the scene of the planned crime so that she would not be an eyewitness [sic] and victim of the robbery and would be less likely to be able to establish [the defendant's] connection to the robbery."<sup>219</sup> The court's ruling supports the notion:

When a declaration occurs during a conspiracy and is relevant enough to be offered against the defendant, its role in furtherance of the conspiracy is usually so self-evident as to warrant no more than a conclusory reference to the furtherance requirement in stating the manifest admissibility of the declaration pursuant to the co-conspirator exception.<sup>220</sup>

### 3. Requirement of pendency

The pendency prong with respect to the co-conspirator hearsay exception requires that the statement must be made *during* the

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215. See CAL. EVID. CODE § 1223 (West 2003); *Von Villas*, 11 Cal. App. 4th at 231–32, 15 Cal. Rptr. 2d at 145–46.

216. See *Von Villas*, 11 Cal. App. 4th at 231–32, 15 Cal. Rptr. 2d at 145–46.

217. 11 Cal. 4th 475, 515, 905 P.2d 420, 439, 46 Cal. Rptr. 2d 751, 770 (1995).

218. *Id.* at 515–16, 905 P.2d at 440, 46 Cal. Rptr. 2d at 771.

219. *Id.* at 516, 905 P.2d at 440, 46 Cal. Rptr. 2d at 771.

220. Oakley, *supra* note 177, at 26.



conspiracy, not before it commenced or after it terminated.<sup>221</sup> "It is for the trier of fact—considering the unique circumstances and the nature and purpose of the conspiracy of each case—to determine precisely when the conspiracy has ended."<sup>222</sup>

#### *F. Conclusion*

Given the unique procedural aspects and the possibility for enhanced punishment, it is not hard to see that conspiracy is a powerful weapon in the prosecutor's arsenal. The potential abuse of this weapon, however, has generated debates on whether the conspiracy doctrine creates an unfair advantage for the prosecutor and whether the doctrine itself is even necessary.<sup>223</sup> Yet, it is undeniable that group criminal actions are typically more dangerous than individual acts, and that the nature of secret conspiratorial agreements is such that there is often little evidence available for prosecution. We need to be able to control the danger of people getting together, encouraging each other, and planning bigger and more complex crimes—before it is too late. Ultimately, conspiracy appears to be an effective device to deal with serious group criminal behavior. However, how the doctrine is applied in certain circumstances may mean the difference between capturing the culpable mastermind behind a nefarious plot and excessively punishing the "small fish" for a crime beyond his control and expectations.

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221. See *Leach*, 15 Cal. 3d at 436, 541 P.2d at 307, 124 Cal. Rptr. at 763; see also *People v. Dominguez*, 121 Cal. App. 3d 481, 497 n.17, 175 Cal. Rptr. 445, 454 n.17 (1981) ("No act or declaration of a conspirator that is committed or made after the conspiracy has been terminated is binding upon his co-conspirators, and they are not criminally liable for any such act."). For a more in depth discussion of when a conspiracy is deemed to begin and end, see *Duration/Termination supra* Part VIII.C.

222. *Hardy*, 2 Cal. 4th at 143, 825 P.2d at 811, 5 Cal. Rptr. at 826.

223. See *Johnson*, *supra* note 4, at 1138.; *Marcus*, *supra* note 3, at 926–27, 965–67

**IX. SELF-DEFENSE\***

California Penal Code section 197 states, "Homicide is . . . justifiable when committed by any person . . . [who is] resisting any attempt to murder any person . . ." <sup>1</sup> This definition does not fully reflect the complexities involved in deciding when self defense is a

Section A examines the current controversy surrounding how much of the defendant's experiences and point of view should be considered in determining how an objectively reasonable person would act in the same position as the defendant. Section B introduces and discusses the concept of justifiable homicide. In Sections C and D, the requirement of imminent harm and the test for reasonable belief are discussed in detail. Section E then discusses imperfect self-defense and self-defense based on delusion. Moreover, throughout this Part, development of the self-defense doctrine in battered women's syndrome cases is discussed and compared to the more common applications of self-defense. Finally, this Part concludes with a discussion of where the courts seem to be heading.

#### *A. A Killing in Self-Defense is Justifiable*

Justifiable and excusable homicide is not punishable in California.<sup>7</sup> California Penal Code section 199 states that if "[t]he homicide appear[s] to be justifiable or excusable, the person indicted must . . . be fully acquitted and discharged."<sup>8</sup> The statute is simple and straightforward, but case law provides a multitude of issues that must be considered.

California Penal Code section 197 states that "[h]omicide is . . . justifiable when committed by any person [who is] . . . resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person."<sup>9</sup> When a person acts justifiably and commits murder, the act is privileged.<sup>10</sup> A privileged act is one that would usually subject the offender to liability, but it does not do so under the circumstances in which the act took place.<sup>11</sup>

The amount of force used by the defendant in self-defense must be only that which is necessary. The use of excessive force destroys

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7. See CAL. PENAL CODE § 199 (West 1999 & Supp. 2002).

8. *Id.*

9. CAL. PENAL CODE § 197.

10. See, e.g., *People v. Hardin*, 85 Cal. App. 4th 625, 102 Cal. Rptr. 2d 262 (2000) (holding that the victim was privileged to use force in evicting defendant from her home but the defendant's use of force against the victim's force was not privileged).

11. See *id.*

the justification, and therefore the defense.<sup>12</sup> For example, in *People v. Bates*, the defendant and the victim were involved in a “tussle” in the kitchen of the defendant’s restaurant.<sup>13</sup> The victim grabbed a knife and stabbed the defendant in the hip.<sup>14</sup> The defendant grabbed and secured the knife, and then repeatedly stabbed the victim in the back, killing him.<sup>15</sup> The court stated, “Self-defense may be resorted to in order to repel force, but not to inflict vengeance.”<sup>16</sup> Although the victim attacked first, the court concluded that there was no reason for the defendant to take the victim’s life.<sup>17</sup> The court held that “justifiable homicide connotes only the use of force . . . which reasonably appears to be necessary, to resist the other party’s misconduct . . . [and] that use of excessive force destroys the justification . . . .”<sup>18</sup>

### *B. Requirement of Imminent Harm*

#### 1. General definition

Fear of imminent harm is an essential element to self-defense.<sup>19</sup> The fear of harm must be substantial enough to cause a reasonable person to fear death or great bodily injury.<sup>20</sup>

However, in some circumstances, imminent harm is not a defense for murder.<sup>21</sup> For example, in *People v. Hardin*, the defendant broke into the resident’s home and was attacked with a hammer by the resident after the defendant failed to comply with her request to leave.<sup>22</sup> The defendant then struck and killed the

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12. See *People v. Bates*, 256 Cal. App. 2d 935, 939, 64 Cal. Rptr. 575, 578 (1967).

13. See *id.* at 938, 64 Cal. Rptr. at 577.

14. See *id.*

15. See *id.*

16. *Id.* at 939, 64 Cal. Rptr. at 578.

17. See *id.* at 939, 64 Cal. Rptr. at 577.

18. *Id.* at 939, 64 Cal. Rptr. at 578 (citing *People v. Young*, 214 Cal. App. 2d 641, 646, 29 Cal. Rptr. 595, 598 (1963)).

19. See CAL. PENAL CODE §§ 197–198 (West 1999 & Supp. 2002).

20. See *id.*

21. See *People v. Hardin*, 85 Cal. App. 4th 625, 631–32, 102 Cal. Rptr. 2d 262, 266 (2000).

22. See *id.*

resident.<sup>23</sup> The court held that the defendant's belief that he was in imminent and deadly peril ended when he disarmed the resident.<sup>24</sup> Furthermore, the court held that a person who breaks into someone else's home cannot assert self-defense if the home owner attacks him.<sup>25</sup> In sum, when a resident acts with deadly force against an intruder in his residence, there is a presumption of imminent harm.<sup>26</sup>

## 2. Imminent harm in battered women's syndrome cases<sup>27</sup>

The California Supreme Court expanded the definition of imminent harm in the case of a battered woman in *People v. Humphrey*.<sup>28</sup> The defendant, a battered woman according to expert testimony, believed she was in imminent harm as a result of both her interactions with the victim and the cycle of escalating violence that characterized her relationship with the victim.<sup>29</sup>

Battered women are typically involved in a continuing "cycle of violence" that begins early in life and continues into adulthood.<sup>30</sup> In *Humphrey*, the defendant was molested by her father from the age of seven to the age of fifteen, and she was later involved in another abusive relationship.<sup>31</sup>

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23. See *id.*

24. See *id.* at 634, 102 Cal. Rptr. 2d at 268.

25. See *id.* at 633-34, 102 Cal. Rptr. 2d at 267-68.

26. In *People v. Owen*, 277 Cal. Rptr. 341, 347, 226 Cal. App. 3d 996, 1005 (1991), the court stated that California Penal Code section 198.5 creates a rebuttable presumption of reasonable fear:

[T]he statute was enacted to permit residential occupants to defend themselves from intruders without fear of legal repercussions, to give "the benefit of the doubt in such cases to the resident, establishing a presumption that the very act of forcible entry entails a threat to the life and limb of the homeowner." (Press release from the office of Sen. H. L. Richardson (the bill's author) Oct. 1, 1984).

27. "Battered women's syndrome 'has been defined as a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives.'" *People v. Humphrey*, 13 Cal. 4th 1073, 1083-84, 921 P.2d 1, 7, 56 Cal. Rptr. 2d 142, 148-49 (1996) (citations omitted).

28. See *id.*

29. See *id.* at 1073, 921 P.2d at 1, 56 Cal. Rptr. 2d at 142.

30. See *id.* at 1079, 921 P.2d at 4, 56 Cal. Rptr. 2d at 145.

31. See *id.* at 1079-80, 921 P.2d at 4, 56 Cal. Rptr. 2d at 146.

During the defendant's relationship with her husband, the husband repeatedly brutalized the defendant by hitting her and threatening to kill her.<sup>32</sup> The day before the defendant shot her husband, the husband fired his gun at her, narrowly missing her. Then, on the day of the husband's death, the couple drove into the mountains, where the husband said that the mountains would be a good place to kill the defendant.<sup>33</sup>

Later that night, Humphrey shot her husband and then claimed self-defense, arguing that the killing was justifiable because she was in imminent fear for her life.<sup>34</sup> However, Humphrey killed the victim *following* an argument that had escalated into threats of violence, not *during* the argument.<sup>35</sup> Her husband was unarmed and not overtly threatening her at the time of his death.<sup>36</sup> Nonetheless, the court applied California Evidence Code section 1107 and held that the defendant's objectively reasonable belief in the imminence of harm could be examined from her viewpoint as a battered woman.<sup>37</sup> For the first time, the court admitted evidence of battered women's syndrome to prove the objective reasonableness of the defendant's fear of imminent harm, and held that a perception of imminent harm could "reasonably follow from the defendant's experience as a battered woman."<sup>38</sup>

In ruling that the defendant's past perceptions could create a reasonable fear of imminent harm, the court fundamentally changed

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32. *See id.* at 1080, 921 P.2d at 4, 56 Cal. Rptr. 2d at 146.

33. *See id.*

34. *See id.* at 1082, 921 P.2d at 5–6, 56 Cal. Rptr. 2d at 147.

35. *See id.* at 1077, 921 P.2d at 4–5, 56 Cal. Rptr. 2d at 146.

36. *See id.* at 1077–78, 921 P.2d at 2–3, 56 Cal. Rptr. 2d at 144–45. The defendant reported to the police that before firing, she told the victim, "You're not going to hit me anymore." At the scene of the crime, the defendant told the police officer, "I'm just tired of him hitting me." He said, "You're not going to do nothing about it." She stated, "I showed him, didn't I?" The prosecution pointed to these statements as evidence of the lack of *imminent* harm. *Id.* at 1077, 921 P.2d at 3, 56 Cal. Rptr. at 144–45.

37. The California Evidence Code provides, "[i]n a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence . . . ." CAL. EVID. CODE § 1107(a) (West 1995 & Supp. 2003).

38. *Humphrey*, 13 Cal. 4th at 1085, 921 P.2d at 8, 56 Cal. Rptr. 2d at 149–50.

the defining properties of reasonable belief in imminent harm. This change, however, remains limited to cases involving battered women's syndrome.

### 3. Expansion of "imminence" in other contexts

The courts retain a narrow definition of "imminence" in other types of cases.<sup>39</sup> Although the court was willing to modify the way it examined reasonable belief in imminence in *Humphrey* to include a view of imminence from the defendant's perspective,<sup>40</sup> it was unwilling to do so in the case of *People v. Romero*.

In *Romero*, the defendant was a gang member who killed a member of a rival gang during a street fight.<sup>41</sup> The defendant was armed with a knife, which he used to stab his unarmed rival in the heart.<sup>42</sup> Romero testified that his younger brother was in the area, and that he was responsible for caring for his brother.<sup>43</sup> The defendant testified, "I had to stop [the victim]. From there, I didn't think of nothing else."<sup>44</sup> The defendant argued that he had to stab the victim to protect his brother, and that he therefore committed a privileged act.<sup>45</sup>

However, in *Romero*, the court refused to allow expert testimony that might explain why the defendant felt that harm was imminent based on his perceptions as a Hispanic street gang member.<sup>46</sup> Citing the California Supreme Court's dicta in *Humphrey*, the *Romero* court stated, "Our decision would not, in another context, compel adoption of a 'reasonable gang member' standard."<sup>47</sup> The *Romero* court summarily dismissed the issue of admitting expert evidence on the basis that there was no imminence

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39. See, e.g., *People v. Romero*, 69 Cal. App. 4th 846, 81 Cal. Rptr. 2d 823 (1999) (rejecting expert testimony about street fighting, Hispanic honor, and paternalism in considering whether the defendant actually believed he was in imminent danger).

40. See *Humphrey*, 13 Cal. 4th at 1086, 921 P.2d at 8, 56 Cal. Rptr. 2d at 150.

41. See *Romero*, 69 Cal. App. 4th at 848, 81 Cal. Rptr. 2d at 823-24.

42. See *id.* at 852, 81 Cal. Rptr. 2d at 826.

43. See *id.*

44. *Id.*

45. See *id.*

46. See *id.* at 854, 81 Cal. Rptr. 2d at 827.

47. *Id.*

demonstrated by the facts.<sup>48</sup> Because of the lack of imminent harm, the court held that the expert evidence was irrelevant, stating that it was not necessary to consider reasonableness if there was no imminence.<sup>49</sup>

In *Humphrey*, the court opened the door to allow juries to consider the character, history, and perception of the defendant when evaluating whether a defendant's perception of imminent harm was reasonable.<sup>50</sup> But from a purely factual perspective, *Humphrey* was in no greater imminent harm than *Romero*. In both cases, there was a chance that the violence could escalate.<sup>51</sup> However, at the time of each of the homicides, the violence had not yet escalated or shown any clear signs that it might rise to the level of imminent harm. Nevertheless, the court considered how "the psychological impact of being a battered woman [affected the woman's] perception of [imminent] danger,"<sup>52</sup> yet it ignored the psychological impact of being a gang member.<sup>53</sup>

### C. Requirement of Actual and Reasonable Belief

The test for self-defense consists of a subjective element and an objective element. That is, the defendant must have an actual belief in the need to defend himself against imminent harm, and the defendant's belief in the need to defend himself against imminent harm must be justified "from the point of view of a reasonable person in the position of [the] defendant."<sup>54</sup> If a defendant satisfies both of these requirements, he will be exonerated.<sup>55</sup>

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48. *See id.*

49. *See id.*

50. *See Humphrey*, 13 Cal. 4th at 1085–1089, 921 P.2d at 8–11, 56 Cal. Rptr. 2d at 150–52.

51. In *Humphrey*, the victim did not appear any more or less likely to use lethal force on that particular day, at that particular moment, than he was on other occasions. *See id.* at 1077, 921 P.2d at 3, 56 Cal. Rptr. 2d at 144. Similarly, in *Romero*, although the violence could have easily escalated, it had not yet done so. *See Romero*, 69 Cal. App. 4th 846, 81 Cal. Rptr. 2d 823.

52. *Humphrey*, 13 Cal. 4th at 1084, 921 P.2d at 8, 56 Cal. Rptr. 2d at 149.

53. *Romero*, 69 Cal. App. 4th 846, 81 Cal. Rptr. 2d 823.

54. *See Humphrey*, 13 Cal. 4th at 1083, 921 P.2d at 6–7, 56 Cal. Rptr. 2d at 148 (citing *People v. McGee*, 31 Cal. 2d 229, 238, 187 P.2d 706 (1947)).

55. *See McGee*, 31 Cal. 2d 229, 187 P.2d 706.



"If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense.'"<sup>56</sup> In cases of imperfect self-defense, the defendant has acted without malice and can be convicted of manslaughter, but not murder.<sup>57</sup>

### 1. Subjective test for actual belief

In a homicide case, the subjective element of self-defense requires that a defendant have an honest belief that his life is in imminent danger,<sup>58</sup> and he must act based on that fear alone.<sup>59</sup> Evidence of the defendant's circumstances and mental state are considered.<sup>60</sup>

#### *a. factual evidence of actual belief*

Defendants who claim self-defense are required to prove their actual state of mind in order to show their belief in the need to defend.<sup>61</sup> Accordingly, a defendant is entitled to present evidence to corroborate his contention that he was in actual fear for his life.<sup>62</sup> Character evidence, evidence of threats from third parties, and evidence of the mental state of the defendant are all relevant to show a defendant's belief in imminent harm.<sup>63</sup> In sum, the defendant may present evidence designed to convince the jury that, under the circumstances, he believed that he was in sufficient danger to warrant the use of deadly force.<sup>64</sup>

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56. *Humphrey*, 13 Cal. 4th at 1082, 921 P.2d at 6, 56 Cal. Rptr. 2d at 147-148.

57. *See id.*

58. *See In re Christian S.*, 7 Cal. 4th 768, 773, 872 P.2d 574, 576, 30 Cal. Rptr. 2d 33, 35 (1994).

59. *See* CAL. PENAL CODE § 198 (West 1999 & Supp. 2002).

60. *See, e.g., Humphrey*, 13 Cal. 4th at 1085-89, 921 P.2d at 8-11, 56 Cal. Rptr. 2d 150-52 (stating that the character, history and perception of the defendant should be considered in determining the defendant's honest and reasonable belief of fear for her life).

61. *See id.* at 1082, 921 P.2d at 6, 56 Cal. Rptr. 2d at 147.

62. *See People v. Davis*, 63 Cal. 2d 648, 656, 408 P.2d 129, 133, 47 Cal. Rptr. 801, 805 (1965).

63. *See People v. Minifie*, 13 Cal. 4th 1055, 1067, 920 P.2d 1337, 1344, 56 Cal. Rptr. 2d 133, 139 (1996).

64. *See People v. Minifie*, 13 Cal. 4th 1055, 1066, 920 P.2d 1337, 1342-43, 56 Cal. Rptr. 2d 133, 138 (1996). *See id.* at 1067, 920 P.2d at 1344, 56 Cal. Rptr. 2d at 138.

*b. factual evidence of actual belief in battered women's syndrome cases*

The same requirements of actual and reasonable belief in the need to defend against imminent harm apply in cases involving battered women's syndrome. However, expert evidence can be considered in determining the defendant's actual belief. For example, in *People v. Aris*, the trial court admitted expert evidence of battered women's syndrome to support the defendant's actual belief in imminent harm.<sup>65</sup> The court of appeal stated that the evidence was relevant to the defendant's subjective mental state, the first element of a claim of self-defense.<sup>66</sup> In addition, the court of appeal held that the admission of expert testimony was relevant "as to how the defendant's particular experiences as a battered woman affected her perceptions of danger, its imminence, and what actions were necessary to protect herself."<sup>67</sup>

2. Objective test for reasonable belief

The objective or "reasonableness" element of self-defense looks to the perceptions and actions of the reasonable person in determining whether or not a defendant's actions are warranted.<sup>68</sup> This is the same hypothetical "reasonable person" test that the court utilizes in many cases dealing with torts or contracts. When determining whether an action is objectively reasonable, we ask whether a reasonable person, placed in the same circumstances and

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65. See 215 Cal. App. 3d 1178, 1197, 264 Cal. Rptr. 167, 179-80 (1989).

66. See *id.*

67. *Id.* at 1198, 264 Cal. Rptr. at 180. However, the court of appeal in *Aris* held that although battered women's syndrome evidence was admissible to prove the actual or honest belief element of perfect self-defense, it was not admissible to prove the reasonableness element. See *id.* at 1199, 264 Cal. Rptr. at 180-81. The California Supreme Court reversed that position when it ruled that battered women's syndrome evidence was also admissible to prove objective belief in *Humphrey* in 1996. *Humphrey*, 13 Cal. 4th at 1085-89, 921 P.2d at 8-11, 56 Cal. Rptr. 2d 150-52. The reasonableness element now examines both the individual's perceptions and actions. See *id.*

68. See *Minifie*, 13 Cal. 4th at 1065-66, 920 P.2d at 1342-43, 56 Cal. Rptr. 2d at 138.

with the same knowledge as the defendant, would have acted in the same manner.<sup>69</sup>

The objective test is based on appearances. A defendant's actions are not evaluated from his perspective, but from the perspective of the reasonable person standing in his shoes. For example, in *People v. Minifie*, the defendant killed another man because he feared that the decedent would seek retribution for the death of his associate.<sup>70</sup> The court held that the test for objective reasonableness includes "how the situation appeared to the defendant, not the victim" and allowed the jury to consider the defendant's perception of the situation in evaluating how a reasonable person would have acted.<sup>71</sup> This was "[b]ecause [j]ustification does not depend upon the existence of actual danger but rather depends on appearances."<sup>72</sup>

*a. individualizing the objective element of self-defense*

Reasonableness is generally measured by examining how a reasonable person would behave when placed in the shoes of the defendant. The present dilemma involves just how much of the defendant's knowledge, information, and experience should be attributed to the reasonable person before evaluating how he would react in a given situation. The challenge is to find a clear distinction between how a reasonable person in the position of a gang member would act, compared to how a reasonable gang member would act. Despite the difficulty, courts have been careful to draw the distinction.<sup>73</sup>

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69. See *Humphrey*, 13 Cal. 4th at 1082–83, 921 P.2d at 6, 56 Cal. Rptr. 2d at 148.

70. See *Minifie*, 13 Cal. 4th at 1055, 920 P.2d at 1337, 56 Cal. Rptr. 2d at 133.

71. *Id.* at 1068, 920 P.2d at 1344, 56 Cal. Rptr. 2d at 139–40.

72. *Id.* (citing *People v. Clark*, 130 Cal. App. 3d 371, 377, 181 Cal. Rptr. 682, 685 (1982)); see also CALJIC § 5.51 (6th ed. 2002) ("If the defendant kills an innocent person, but circumstances made it reasonably appear that the killing was necessary in self-defense, that is tragedy, not murder.") (internal quotations omitted).

73. See, e.g., *People v. Romero*, 69 Cal. App. 4th 846, 81 Cal. Rptr. 2d 823 (1999) (holding that the role of street fighters in the Hispanic culture is irrelevant in determining whether the defendant actually believed he was in imminent danger of death).

The dilemma is illustrated in *People v. Romero*, where the defendant killed a rival gang member.<sup>74</sup> Refusing to admit the testimony of a professor who was an expert in Hispanic culture, the court affirmed the lower court's decision that the proposed testimony was "clearly irrelevant."<sup>75</sup> The California Supreme Court agreed with the trial court, stating that it was "not prepared to sanction a 'reasonable street fighter standard.'"<sup>76</sup> The court dismissed sociological evidence concerning the defendant's state of mind, stating that because the defendant was unable to present evidence that he was in fear for his life or his brother's life, the evidence could not be used to prove that he had either an objective or subjective fear for his life.<sup>77</sup>

The decision to refuse to admit expert testimony in *Romero* contradicts the *Minifie* principle of allowing the jury to use the knowledge, information, and experience of the defendant when considering whether the defendant thought harm was imminent.<sup>78</sup> In *Minifie*, the court stated that what mattered in determining imminence is how the situation appears to the defendant.<sup>79</sup>

*b. individualizing the reasonableness test in battered women's syndrome cases*

In battered women's syndrome cases, the standard for admitting evidence of the defendant's actual awareness (subjective evidence) to prove the objective element of self-defense is dramatically different from the standard in *Romero*.<sup>80</sup> The objective test for battered women now includes a much larger subjective component. For example, in *Humphrey*, the court stated that a jury *should* consider some degree of individualized experiences of the defendant when

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74. *See id.*

75. *Id.* at 852 n.2, 81 Cal. Rptr. 2d at 826 n.2.

76. *Id.* at 848, 81 Cal. Rptr. 2d at 824 (quoting the trial court).

77. *See id.* at 855, 81 Cal. Rptr. 2d at 828.

78. *See Minifie*, 13 Cal. 4th at 1068, 920 P.2d at 1334, 56 Cal. Rptr. 2d at 139.

79. *See id.*

80. *See Romero*, 69 Cal. App. 4th at 852, 81 Cal. Rptr. 2d at 826.

making an evaluation of what a reasonable person in the defendant's circumstances would view as imminent.<sup>81</sup>

In *Humphrey*, the court held that "[i]n determining whether a reasonable person *in defendant's position* would have been aware of the risks, the jury should be given relevant facts as to what defendant knew, including his actual awareness of those risks."<sup>82</sup> The court stated, "Although the ultimate test of reasonableness is objective, in determining whether a reasonable person in defendant's position would have believed in the need to defend, the jury must consider all of the relevant circumstances in which defendant found herself."<sup>83</sup>

Thus, the California Supreme Court held that the court in *People v. Aris* was incorrect when it precluded admission of individualized evidence of the defendant's status as a battered woman for purposes of the objective test.<sup>84</sup> In *Humphrey*, the court redefined how the objective standard was applied. The court ruled that the objective test in a battered women's syndrome case is how the reasonable person would react in the position of a battered woman, knowing what she knows and reacting to the circumstances in light of her experiences.<sup>85</sup> The court held that the trial court erred in "not admitting the testimony to show how the defendant's particular experiences as a battered woman affected her perceptions of danger, its imminence, and what actions were necessary to protect herself."<sup>86</sup> The court stated in dicta that previous cases "too narrowly interpreted the reasonableness element . . . [and] failed to consider that the jury, in determining objective reasonableness, must view the situation from the *defendant's perspective*."<sup>87</sup>

The court further clarified this point in *People v. Jaspar*, stating that battered women's syndrome "is relevant to the question of

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81. See *Humphrey*, 13 Cal. 4th at 1088–89, 921 P.2d at 10, 56 Cal. Rptr. 2d at 152.

82. *Id.* at 1083, 921 P.2d at 7, 56 Cal. Rptr. 2d at 148.

83. *Id.*

84. See *id.* at 1085, 921 P.2d at 8, 56 Cal. Rptr. 2d at 150–51; cf. *Aris*, 215 Cal. App. 3d at 1197, 264 Cal. Rptr. at 179.

85. See *Humphrey*, 13 Cal. 4th at 1084, 921 P.2d at 7–8, 56 Cal. Rptr. 2d at 149.

86. *Id.* 13 Cal. 4th at 1085, 921 P.2d at 8, 56 Cal. Rptr. 2d at 150 (quoting *Aris*, 215 Cal. App. 3d at 1197, 264 Cal. Rptr. at 179) (internal quotations omitted).

87. *Id.* at 1086, 921 P.2d at 8, 56 Cal. Rptr. 2d at 150.

whether defendant's actual belief is reasonable."<sup>88</sup> First, escalating violence can cause a woman to become "increasingly sensitive to the abuser's behavior,"<sup>89</sup> which is relevant to determining whether a defendant might reasonably believe that her life was in imminent danger even though the attacker might not, at that moment, be an overt threat to the battered woman's safety. Second, the expert's testimony might be used to provide the jury with evidence that a battered woman might be able to more accurately predict the likelihood and extent of a forthcoming attack.<sup>90</sup>

Since *Humphrey*, the courts allowed the presentation of evidence of battered women's syndrome to prove both the subjective and the objective elements of fear of imminent harm.<sup>91</sup> This has resulted in blurring the lines between a reasonable person in the shoes of a battered woman and a reasonable battered woman.

*c. uneven treatment of individualized traits  
in the objective test*

It is unclear why the courts admit evidence of battered women's syndrome in such a broad manner, yet decline to admit similar evidence for many other factors affecting reasonableness. Current case law is murky as to why the courts have developed this dichotomy.

California's legislature has assured the admission of testimony in battered women's syndrome cases by enacting California Evidence Code section 1107, which specifically states that evidence of battered women's syndrome should be admitted to prove its "physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence."<sup>92</sup> Section 1107 clearly supports the use of evidence of battered women's syndrome for the subjective test.<sup>93</sup> However, the courts have also used it as a vehicle

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88. 98 Cal. App. 4th 99, 108, 119 Cal. Rptr. 2d 470, 476 (2002).

89. *Humphrey*, 13 Cal. 4th at 1086, 921 P.2d at 8-9, 56 Cal. Rptr. 2d at 150.

90. *See id.* at 1080, 921 P.2d at 9, 56 Cal. Rptr. 2d at 150.

91. *People v. Jaspas*, 98 Cal. App. 4th 99, 119 Cal. Rptr. 2d 470 (2002).

92. CAL. EVID. CODE § 1107(a) (West 1995 & Supp. 2003).

93. *See id.*

through which to consider a battered woman's individualized traits in applying the objective test.<sup>94</sup>

#### *D. Imperfect Self-Defense*

A defendant who establishes a subjective belief, but *not* an objective belief, in the need to defend herself is entitled to plead imperfect self-defense. The doctrine of imperfect self-defense assumes that the defendant acted without malice aforethought, thereby preventing the defendant from being convicted of murder.<sup>95</sup> The defendant can be found guilty of either voluntary manslaughter (if the defendant had intent to kill at the time of the killing), or involuntary manslaughter (if the defendant did not have intent to kill).<sup>96</sup>

##### 1. Imperfect self-defense after the elimination of the diminished capacity defense

Although the diminished capacity defense was eliminated by statute,<sup>97</sup> imperfect self-defense remains a viable defense.<sup>98</sup> Although the California Legislature precluded a jury from considering the defendant's capacity to form criminal intent, "it did not preclude jury consideration of mental condition in deciding whether or not a defendant *actually* formed the requisite criminal intent."<sup>99</sup>

In the matter of *In re Christian S.*, the California Supreme Court reaffirmed the viability of imperfect self-defense following the statutory changes.<sup>100</sup> The court reviewed the legislative record and concluded that the California Legislature did not intend to alter the

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94. See, e.g., *Romero*, 69 Cal. App. 4th at 853, 81 Cal. Rptr. 2d at 826-27.

95. See *People v. Humphrey*, 13 Cal. 4th 1073, 1082, 921 P.2d 1, 6, 56 Cal. Rptr. 2d 142, 147-48 (1996).

96. See *id.*

97. See CAL. PENAL CODE § 25(a) (West 1999) (abolishing the defense of diminished capacity); CAL. PENAL CODE § 28(a) (making evidence of mental disease, mental defect, or mental disorder inadmissible to show or negate the capacity to form any mental state).

98. See, e.g., *People v. Gregory*, 101 Cal. App. 4th 1149, 1169, 124 Cal. Rptr. 2d 776, 791 (2002), *cert. granted*, 58 P.3d 928, 127 Cal. Rptr. 2d 799 (Cal. 2002) (exploring the doctrine of diminished capacity).

99. *Id.*

100. 7 Cal. 4th 768, 771, 872 P.2d 574, 575, 30 Cal. Rptr. 2d 33, 34 (1994).

doctrine of imperfect self-defense when it eliminated the diminished capacity defense.<sup>101</sup>

The defendant in *Christian S.* was a minor who sought review of his conviction for second-degree murder. The trial court rejected the defendant's claims of self-defense and imperfect self-defense.<sup>102</sup> It concluded that the killing would have constituted second-degree murder had it been committed by an adult, and held that there was inadequate provocation to find the defendant guilty of voluntary manslaughter.<sup>103</sup> The trial court failed to state whether it rejected imperfect self-defense on the basis that it was no longer good legal doctrine or because the court did not attribute a subjective belief in the need for self-defense to the defendant.

The California Supreme Court reversed and clarified the doctrine of imperfect self-defense.<sup>104</sup> In holding that the doctrine of imperfect self-defense survived the amended statutory changes, the supreme court stated, "When the trier of fact finds that a defendant killed another person because the defendant actually but unreasonably believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and cannot be convicted of murder."<sup>105</sup>

## 2. Imperfect self-defense as a result of delusion

On November 26, 2002, the California Supreme Court granted review in the case of *People v. Gregory*.<sup>106</sup> In *Gregory*, the defendant's actual belief in the need to defend himself was based on his own delusion.<sup>107</sup> The defendant was initially found incompetent to stand trial.<sup>108</sup> He suffered from schizophrenia and a resulting paranoid delusion that several individuals intended to kill him.<sup>109</sup> Gregory was committed to a state hospital until his competency was

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101. *See id.*

102. *See id.* at 772, 872 P.2d at 575-76, 30 Cal. Rptr. 2d at 34-35.

103. *See id.*

104. *See id.* at 783, 872 P.2d at 583, 30 Cal. Rptr. 2d at 42.

105. *Id.*

106. 101 Cal. App. 4th 1149, 124 Cal. Rptr. 2d 776 (2002), *cert. granted*, 58 P.3d 928, 127 Cal. Rptr. 2d 799 (2002).

107. *See id.* at 1155, 124 Cal. Rptr. 2d at 779-780.

108. *See id.*

109. *See id.*



restored.<sup>110</sup> At his subsequent trial, he pled no contest to a charge of second-degree murder.<sup>111</sup>

The trial court later ruled that the defendant had not been advised of the possible defense of imperfect self-defense.<sup>112</sup> Consequently, the court vacated the judgment of conviction and set aside the no contest plea.<sup>113</sup> However, the court of appeal reversed, holding that imperfect self-defense must be based on a mistake of fact, not a delusion.<sup>114</sup>

The court of appeal reviewed de novo the issue of whether a delusional belief of imminent harm can satisfy imperfect self-defense.<sup>115</sup> The court stated that based on *Christian S.*, imperfect self-defense is applicable only when a defendant acts as the result of an unreasonable mistake of fact, and not on the basis of a delusion.<sup>116</sup> The court of appeal in *Gregory* based this distinction on the California Supreme Court's statement that a defendant lacks malice if "he acted under an unreasonable mistake of fact—that is, the need to defend himself against imminent peril of death or great bodily harm."<sup>117</sup>

The court of appeal in *Gregory* concluded:

[A] mistake of fact is predicated upon a negligent perception of facts, not, as in the case of a delusion, a perception of facts not grounded in reality. A person acting under a delusion is not negligently interpreting actual facts; instead, he or she is out of touch with reality. That may be insanity, but it is not a mistake as to any fact.<sup>118</sup>

The defendant did not present facts sufficient to prove that he experienced delusion.<sup>119</sup> The court of appeal held that the imperfect

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110. See *id.* at 1154, 124 Cal. Rptr. 2d at 779.

111. See *id.*

112. See *id.*

113. See *id.*

114. See *id.* at 1172, 124 Cal. Rptr. 2d at 793.

115. See *id.* at 1173, 124 Cal. Rptr. 2d at 794.

116. See *id.* at 1172, 124 Cal. Rptr. 2d at 793.

117. *Gregory*, 101 Cal. App. 4th at 1173, 124 Cal. Rptr. 2d at 793 (citing *Christian S.*, 7 Cal. 4th at 779 n.3, 872 P.2d at 580 n.3, 30 Cal. Rptr. 2d 39 at n.3).

118. *Gregory*, 101 Cal. App. 4th at 1172, 124 Cal. Rptr. 2d at 793.

119. See *id.* at 1178, 124 Cal. Rptr. 2d at 798.

self-defense doctrine did not apply in this circumstance because a defendant must present facts to corroborate actual belief to adequately support a claim of imperfect self-defense.<sup>120</sup> It will be interesting to hear whether the California Supreme Court will allow the imperfect self-defense doctrine to be based on delusion in view of the trend towards allowing a defendant's perceptions to factor into the objective test, as in the case of battered women.

### 3. Jury instructions on imperfect self-defense

A court has a duty to instruct the jury on the theory of imperfect self-defense whenever there is evidence sufficient to support a self-defense claim.<sup>121</sup> This is because "[t]he subjective elements of self-defense and imperfect self-defense are identical. Under each theory, the [defendant] must actually believe in the need to defend himself against imminent peril to life or great bodily injury."<sup>122</sup>

For example, in *People v. Viramontes*, the defendant was accused of murdering the victim while they were attending a party.<sup>123</sup> The defense presented evidence at trial that indicated that the defendant shot the victim because the defendant felt threatened by him.<sup>124</sup> However, during the trial, the defense never mentioned the theory of imperfect self-defense.<sup>125</sup> When the trial court considered which jury instructions were appropriate, it erroneously interpreted California Jury Instruction section 5.17<sup>126</sup> to be limited to instances when the defendant claims an actual, but unreasonable fear of death

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120. See *id.* at 1174, 124 Cal. Rptr. 2d at 795.

121. See *People v. Viramontes*, 93 Cal. App. 4th 1256, 1262, 115 Cal. Rptr. 2d 229, 232 (2001).

122. *Id.*

123. See *id.* at 1259, 115 Cal. Rptr. 2d at 230.

124. See *id.* at 1263, 115 Cal. Rptr. 2d at 233.

125. See *id.* at 1262, 115 Cal. Rptr. 2d at 232.

126. CALJIC § 5.17 (6th ed. 2002) states in part:

A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of . . . manslaughter.

or great bodily injury.<sup>127</sup> The court of appeal found the trial court's reasoning faulty, holding that evidence which supports a claim of self-defense necessarily supports a claim of imperfect self-defense.<sup>128</sup> The court of appeal held that the imperfect self-defense instruction should have been given.<sup>129</sup>

#### 4. Constitutional right to present evidence of imperfect self-defense

A defendant has a constitutional right to present a defense, including self-defense.<sup>130</sup> In *DePetris v. Kuykendall*, the Ninth Circuit held that a defendant must be allowed to present evidence of actual belief in the need to defend.<sup>131</sup>

In *Depetris*, the defendant was convicted of first-degree murder in the death of her husband.<sup>132</sup> At trial, she was not permitted to present evidence related to the existence or content of her husband's journal, which the trial court excluded as irrelevant.<sup>133</sup> The journal, which the defendant had read prior to the killing, contained the victim's own "chilling account" of his prior physical abuse of his homosexual companion, his stepdaughter, and numerous beatings of his first wife.<sup>134</sup>

The court held that excluding the journal unconstitutionally impeded the defendant's "ability to defend [herself] against the charges against her."<sup>135</sup> In addition, the court stated in dicta that evidence of the diary was also clearly admissible under California Evidence Code section 1107.<sup>136</sup>

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127. See *Viramontes*, 93 Cal. App. 4th at 1262, 15 Cal. Rptr. 2d at 232.

128. See *id.*, 15 Cal. Rptr. 2d at 233.

129. See *id.*

130. See *DePetris v. Kuykendall*, 239 F.3d 1057, 1063 (9th Cir. 2001).

131. See *id.* at 1062–63.

132. See *id.* at 1060.

133. See *id.* at 1060–61.

134. *Id.* at 1059–61.

135. *Id.* at 1065.

136. See *id.* at 1061.

5. Jury instructions for imperfect self-defense for battered women's syndrome cases

Battered women's syndrome evidence is generally relevant for three different purposes in murder cases.<sup>137</sup> First, it helps the jury to determine the credibility of the defendant in evaluating the defendant's claim of self-defense and dispels "commonly held misconceptions about battered women."<sup>138</sup> Second, it is relevant to evaluate whether the defendant held an honest or actual belief in the need to defend against imminent harm.<sup>139</sup> Finally, it is relevant in a murder case to prove reasonableness under the objective test.<sup>140</sup>

In *Jaspar*, the defendant was convicted of second-degree murder in the death of her boyfriend, whom she shot in the back of the head.<sup>141</sup> The court used a modified version of California Jury Instructions section 9.35.1, instructing the jury that evidence of battered women's syndrome can be considered for four limited purposes:

1) that the [d]efendant's reactions, as demonstrated by the evidence, are not inconsistent with her having been a victim of domestic violence; 2) the beliefs, perception or behavior of victims of domestic violence; 3) proof relevant to the believability of the defendant's testimony; 4) *whether the defendant actually and reasonably believed in the necessity to use force to defend herself against imminent peril to life . . .* In assessing reasonableness, the issue is whether a reasonable person in the [d]efendant's circumstances would have seen a threat of imminent injury or death, and not whether killing the alleged abuser was reasonable in the sense of being an understandable response to ongoing abuse. An act that appeared to be an understandable

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137. See *People v. Jaspar*, 98 Cal. App. 4th 99, 107, 119 Cal. Rptr. 2d 470, 475 (2002).

138. *Id.* (quoting *People v. Humphrey*, 13 Cal. 4th 1073, 1087, 921 P.2d 1, 9, 56 Cal. Rptr. 2d 142, 150 (1996)).

139. See *id.*

140. See previous discussion of the objective test for reasonableness *supra* Part IX.C.

141. See *Jaspar*, 98 Cal. App. 4th at 102, 119 Cal. Rptr. 2d at 471.

response is not necessarily [an] act that was responsible under the circumstances.<sup>142</sup>

After considering whether the final combined instruction precluded a finding of imperfect self-defense, the court held that although the fourth instruction read in isolation might have been confusing, the error was harmless.<sup>143</sup> The court found that the arguments of counsel clarified any potential confusion.<sup>144</sup> However, the court suggested that the language of the fourth instruction should be modified to read "whether the defendant actually . . . believed in the necessity to use force to defend herself against imminent peril to life . . . and whether such belief was reasonable or unreasonable."<sup>145</sup>

### *E. Conclusion*

Although the basic definitions and tests used in the area of self-defense were established hundreds of years ago, they continue to develop towards a more permissive inclusion of evidence of the defendant's knowledge, information, and experience. The courts have continued to utilize the two-prong test for actual and reasonable belief in the need to defend against imminent peril. However, at least in the case of battered women, the courts have expanded the amount and types of knowledge, information, and experiences that are allowed to be attributed to the defendant before the reasonable person standard is applied.<sup>146</sup>

Since the California Supreme Court granted certiorari in *Gregory*, it is unclear whether imperfect self-defense can be based on delusion or whether imperfect self-defense is limited to mistakes of fact.<sup>147</sup> In cases of battered women's syndrome, it is clear that the defendant's knowledge, information, and experiences are relevant and admissible for both evaluating imminent harm and defining the

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142. *Id.* at 108–09, 119 Cal. Rptr. 2d at 476–77. *Cf.* CALJIC § 9.35.1 (6th ed. 2002).

143. *See Jaspar*, 98 Cal. App. 4th at 110, 119 Cal. Rptr. 2d at 477.

144. *See id.* at 111, 119 Cal. Rptr. 2d at 478.

145. *Id.* at 111 n.6, 119 Cal. Rptr. 2d at 479 n.6 (citations omitted).

146. *See, e.g., People v. Humphrey*, 13 Cal. 4th 1073, 1082–83, 921 P.2d 1, 6, 56 Cal. Rptr. 2d 142, 148 (1996) (holding that defendant's subjective belief in the need to defend should be considered by the jury).

147. *See People v. Gregory*, 101 Cal. App. 4th 1149, 124 Cal. Rptr. 2d 776 (2002) *cert. granted*, 1259, 115 Cal. Rptr. 2d at 230 (Cal. 2002).

objective element of self-defense. But this thinking has not yet been extended to other similarly situated defendants including the mentally ill, the developmentally disabled, and battered children. The courts are unwilling to recognize individualized traits in the objective test for gang members, street fighters, and others.<sup>148</sup>

As this area of the law develops, it will be important for the courts to clearly define what evidence of individualized traits and experiences should be attributed to the reasonable person for purposes of the objective element of self-defense. In addition, the courts need to further define how a defendant's viewpoint affects a finding of imminent harm.

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148. See, e.g., *People v. Romero*, 69 Cal. App. 4th 846, 854, 81 Cal. Rptr. 2d 823, 827 (1999) (unwilling to apply reasonable objective test from the perspective of gang members and street fighters).

## X. THE INSANITY DEFENSE\*

Since the Nineteenth century, California has followed, with slight variations,<sup>1</sup> the M’Naghten test for insanity and criminal responsibility.<sup>2</sup> Under the M’Naghten test, a defendant who is unable either to understand the criminal nature of the crime, or to distinguish right from wrong at the time the criminal act was committed, is not held responsible for that act.<sup>3</sup>

Over time, California courts have implemented a number of important variations on, or clarifications of, the basic M’Naghten test for insanity. These include: (1) the additional requirement of understanding and appreciating the nature of the criminal act;<sup>4</sup> (2) the

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1. See *infra* note 4.

2. See *People v. Reid*, 193 Cal. 491, 225 P. 859 (1924); *People v. Oxnam*, 170 Cal. 211, 149 P. 165 (1915); *People v. Pico*, 62 Cal. 50 (1882); *People v. Coffman*, 24 Cal. 230 (1864); *People v. Zari*, 54 Cal. App. 133, 201 P. 345 (1921); *People v. Ashland*, 20 Cal. App. 168, 128 P. 798 (1912). For a discussion of insanity tests used by other jurisdictions, see MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 218–32 (Cambridge University Press 1984); Michelle Migdal Gee, Annotation, *Modern Status of Test of Criminal Responsibility - State Cases*, 9 A.L.R. 4th 529 (1981).

3. See *M’Naghten’s Case*, 8 Eng. Rep. 718 (1843); see also, *People v. Horn*, 158 Cal. App. 3d 1014, 205 Cal. Rptr. 119 (1984) (discussing and explaining the M’Naghten test for legal insanity). For a discussion of why insane defendants are not held responsible for their criminal actions, see MOORE *supra* note 2, at 243–45; Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777 (1985).

4. See *People v. Wolff*, 61 Cal. 2d 795, 801, 394 P.2d 959, 962, 40 Cal. Rptr. 271, 274 (1964); see also, *People v. Wells*, 33 Cal. 2d 330, 351, 202 P.2d 53, 65 (1949) (explaining that in order to be subject to punishment, the defendant must not only know that the act committed is criminal, but must also appreciate its wrongfulness). The addition of the understanding or appreciation requirement to the test is significant because without it, a criminal defendant would be found sane if he was merely aware that the act he committed was unlawful, despite a failure to appreciate the significance of criminality - i.e., acts that are illegal are defined as such because they are wrong.

clarification of the “wrong” contemplated by the test;<sup>5</sup> and (3) the statutory definition of excusable “temporary” insanity.<sup>6</sup>

While the basic gist of the test for insanity has remained substantially the same since its adoption,<sup>7</sup> it has not been without criticism.<sup>8</sup>

In response to such criticism, and after much judicial dissatisfaction with the test,<sup>9</sup> the California Supreme Court rejected the M’Naghten test in *People v. Drew*.<sup>10</sup> In its place, the court adopted the American Law Institute (ALI) test for insanity.<sup>11</sup> However, that test was short lived.<sup>12</sup> In 1982, the California voters and Legislature abrogated the judicially imposed ALI test with the

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5. See *infra* Section A.3 (explaining the difference between moral and legal wrong).

6. See *infra* Section A.1.b (discussing temporary insanity).

7. See *People v. Phillips*, 83 Cal. App. 4th 170, 99 Cal. Rptr. 2d 448 (2000) (stating that California applied the M’Naghton test for insanity); see also, *People v. Coddington*, 23 Cal. 4th 529, 97 Cal. Rptr. 2d 528 (2000) (also applying the M’Naghten test for insanity) (overruled on other grounds by *Price v. Superior Court*, 25 Cal. 4th 1046, 25 P.3d 618, 108 Cal. Rptr. 2d 409 (2001)). California abandoned this approach for a brief period. See generally *People v. Drew*, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978) (rejecting the M’Naghten test for insanity in favor of the American Law Institute (ALI) test: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.” *Drew* was abrogated by popular initiative in 1982. See Proposition 8, in Victim’s Bill of Rights [hereinafter 1982 Victim’s Bill] (codified at CAL. PENAL CODE § 25(b) (West 1999 & Supp. 2003)).

8. See *People v. Nash*, 52 Cal. 2d 36, 46–49, 338 P.2d 416, 422–25 (1959) (discussing various criticisms of the M’Naghten test, including lack of inquiry into defendant’s ability to control his conduct, lack of causal inquiry, and the unscientific nature of the test).

9. See *id.*

10. *Drew*, 22 Cal. 3d at 336, 583 P.2d at 1319, 149 Cal. Rptr. at 275–76.

11. See *id.*; see also *supra* note 7 for definition of the ALI test. The difference between the two tests is that the ALI test includes a volitional aspect, whereas the M’Naghten test does not. See *Drew*, 22 Cal. 3d at 341, 583 P.2d at 1322, 149 Cal. Rptr. at 279 (“[The M’Naghten test] fails to attack the problem presented in a case wherein an accused may have understood his actions but was incapable of controlling his behavior.”).

12. Four years later, the ALI test was abrogated by popular initiative. See 1982 Victim’s Bill, *supra* note 7.



passage of Proposition 8, which added section 25 to the California Penal Code.<sup>13</sup>

Though codification of the test put an end to the debate over the proper test for legal insanity, it marked the beginning of an interpretational dilemma. As enacted by Proposition 8, section 25 restored the M’Naghten test for insanity. However, whereas the M’Naghten test was interpreted disjunctively, the language of section 25 suggested that it should be construed conjunctively.<sup>14</sup> Unable to determine the intent of the California Legislature,<sup>15</sup> California courts struggled to reach the appropriate construction of the statute.<sup>16</sup> Ultimately, the California Supreme Court determined that a conjunctive reading of the statute would be too harsh and, despite the literal language of the statute, settled upon a disjunctive reading.<sup>17</sup>

Pursuant to section 25, a defendant is excused from criminal liability if “he or she was incapable of knowing or understanding the nature or quality of his or her act [or] of distinguishing right from wrong at the time of the commission of the offense.”<sup>18</sup>

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13. See *id.*; CAL. PENAL CODE § 25(b) (West 1999 & Supp. 2003). For a discussion of Proposition 8, its origins and ramifications, see Jeff Brown, *Proposition 8: Origins and Impact—A Public Defender’s Perspective*, 23 PAC. L.J. 881 (1992) and Hank M. Goldberg, *Proposition 8: A Prosecutor’s Perspective*, 23 PAC. L.J. 947 (1992).

14. See CAL. PENAL CODE § 25. A disjunctive reading would excuse a criminal defendant if, at the time of the commission of the crime with which he is charged, he either did not understand or appreciate the nature of his act *or* was unable to differentiate right from wrong. Under a conjunctive reading, a defendant would escape liability only if he was both unable to understand or appreciate the nature or quality of his act *and* was unable to differentiate right from wrong.

15. Proposition 8 was enacted by popular referendum. It is therefore impossible to determine whether those who voted for it intended that the new test be applied conjunctively or disjunctively.

16. See *People v. Coddington*, 23 Cal. 4th 529, 2 P.3d 1081, 97 Cal. Rptr. 528 (2000); *People v. Skinner*, 39 Cal. 3d 765, 704 P.2d 752, 217 Cal. Rptr. 685 (1985); *People v. McCowan*, 182 Cal. App. 3d 1, 227 Cal. Rptr. 23 (1986); *People v. Horn*, 158 Cal. App. 3d 1014, 205 Cal. Rptr. 119 (1984).

17. See *generally Skinner*, 39 Cal. 3d at 765, 704 P.2d 752, 217 Cal. Rptr. at 685 (holding that the test should be read as disjunctive, despite the literal wording of section 25); *People v. Horn*, 158 Cal. App. 3d 1014, 205 Cal. Rptr. 119 (1984) (holding that the statute should be read disjunctively, as a conjunctive reading would restore the “wild beast” test of antiquity).

18. CAL. PENAL CODE § 25.

*A. The Current Law: A Return to M'Naghten*

Although it has been established that the dual requirements set forth in section 25 of the California Penal Code are to be read and applied disjunctively,<sup>19</sup> it would be inaccurate to say that the law regarding the insanity defense is settled, or even straightforward. On its face, the statute has two prongs: (1) the "act prong," which requires that in order to escape responsibility for a criminal act a defendant must prove he or she was unaware of the nature and quality of his or her act; and (2) the "wrongfulness prong," which predicates the insanity defense on a defendant's inability to distinguish right from wrong.<sup>20</sup> Additionally, although not expressly stated by the statute, it is clear that a defendant pleading not guilty by reason of insanity must also meet a third prong—the "mental defect" prong.<sup>21</sup> This threshold requirement demands that the defendant show an inability to understand the nature and quality of his act or that his inability to distinguish right from wrong was caused by a mental disease or defect.<sup>22</sup>

1. The unwritten mental defect prong

The California statute that dictates the test for legal insanity lacks any reference to the mental capacity that is required at the time the defendant commits the act with which he is charged.<sup>23</sup> Thus, a literal reading of the statute suggests that a defendant could have a successful insanity defense even if he were not suffering from a mental disorder, as long as he is able to show that he was unable to appreciate the wrongfulness of his act.<sup>24</sup> However, such a reading of

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19. See, e.g., *Coddington*, 23 Cal. 4th at 529, 2 P.3d at 1081, 97 Cal. Rptr. at 528; *Skinner*, 39 Cal. 3d at 765, 704 P.2d at 752, 217 Cal. Rptr. at 685; *McCowan*, 182 Cal. App. 3d at 1, 227 Cal. Rptr. at 23; *Horn*, 158 Cal. App. 3d at 1014, 205 Cal. Rptr. at 119.

20. See CAL. PENAL CODE.

21. See *id.*; California Jury Instructions no. 4.02 (6th ed. 1996 & Supp. 2002) [hereinafter CALJIC]; see generally *People v. McCaslin*, 178 Cal. App. 3d 1, 223 Cal. Rptr. 587 (1986) (holding that legal insanity must be by reason of mental disease or defect).

22. See CAL. PENAL CODE § 25; CALJIC, no. 4.02; see also *People v. Kelly*, 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (1973); *McCaslin*, 178 Cal. App. 3d 1, 223 Cal. Rptr. 587 (1986).

23. See CAL. PENAL CODE § 25.

24. See *id.*

the statute was rejected in *People v. McCaslin*.<sup>25</sup> There, the defendant argued on appeal that the trial court incorrectly instructed the jury that in order to find the defendant legally insane they must find that the defendant suffered from a mental disease or defect.<sup>26</sup> The court found that the defendant did not satisfy the requirements of the insanity defense because he did not suffer from a mental disease or defect and that the court below had properly instructed the jury.<sup>27</sup> Specifically, the court found that section 25 was "intended to reinstate the defense of insanity to the status which existed prior to [*People v.*] *Drew*."<sup>28</sup> Before *Drew*, the law required that a defendant suffer from a mental disease or defect.<sup>29</sup> Thus, the court concluded that section 25 embodies the same requirement, although it is not expressly stated in the statute.<sup>30</sup>

The court went on to discuss the likely consequences of an interpretation of section 25 that did not include a mental defect requirement.<sup>31</sup> According to the court, such an interpretation would "have the effect of recognizing an 'antisocial personality' as a form of insanity . . . ."<sup>32</sup> The court further noted: "Indeed, the 'antisocial personality' is the classic criminal; our prisons are largely populated by such persons. To classify such persons as insane would radically revise the criminal law—insanity, instead of a rare exception to the rule of criminal accountability, would become the ordinary defense in a felony trial."<sup>33</sup>

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25. *McCaslin*, 178 Cal. App. 3d at 1, 223 Cal. Rptr. at 587.

26. *See id.* Though the statute lacks a mental defect requirement, the jury instruction given both before and after the codification of section 25 instructed the jury that it must find that the defendant suffered from a mental disease or defect that resulted in his inability to either appreciate the nature and quality of his act or to distinguish right from wrong. *See* CALJIC, *supra*, note 21, no. 4.02.

27. *See McCaslin*, 178 Cal. App. 3d at 8–9, 223 Cal. Rptr. at 591–92.

28. *Id.* at 8, 223 Cal. Rptr. at 591. *Drew* held that California should forsake the M'Naghten test for insanity in favor of the test set forth by the American Law Institute. *See People v. Drew*, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978).

29. *See McCaslin*, 178 Cal. App. 3d at 8, 223 Cal. Rptr. at 591.

30. *See id.*

31. *See id.*

32. *Id.*

33. *Id.* at 8–9, 223 Cal. Rptr. at 591–92 (quoting *People v. Fields*, 35 Cal. 3d 329, 372, 673 P.2d 680, 708, 197 Cal. Rptr. 803, 831 (1983)). Similarly, the crime with which the defendant is charged cannot be used as the sole

Given both the state of the law before the judicial departure from California's version of the M'Naghten test for insanity, i.e., defendants must show mental disease or defect to satisfy the test, and the arguably absurd results of interpreting section 25 as *not* requiring a showing of mental disease or defect, after *McCaslin*, the statute must be understood to include such a requirement.

a. "settled" mental defect

Even before codification of the test for insanity, California courts wrestled with the question of exactly what type of mental disease or defect would suffice to relieve a defendant of criminal responsibility. Obviously, the mental defect must be present at the time the defendant committed the act with which he is charged.<sup>34</sup> But how long before the act must the condition exist, how serious must it have been, and how long after the act must the condition have persisted?

Whether a defendant is insane within the meaning of section 25 is a legal, as opposed to medical, determination.<sup>35</sup> However, medical insights inform the legal determination.<sup>36</sup> Mental defect "includes any abnormal condition of the mind which substantially impairs behavior controls."<sup>37</sup> Sociopaths, psychopaths, and defendants suffering antisocial personality disorders do not legally have mental defects; defendants must point to symptoms and manifestations of a disorder other than recidivism or antisocial acts.<sup>38</sup>

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evidence of insanity. In other words, a heinous crime is not evidence that the defendant is insane simply because only a crazy person would commit a heinous crime. *See id.*

34. *See id.* at 8, 223 Cal. Rptr. at 591.

35. *See generally* *People v. Cowan*, 38 Cal. App. 2d 144, 100 P.2d 1079 (1940) (holding that a medical determination of insanity is not sufficient to establish legal insanity, for medical insanity does not necessarily preclude a defendant from distinguishing between right and wrong).

36. *See People v. Drew*, 22 Cal. 3d 333, 345, 583 P.2d 1318, 1324, 149 Cal. Rptr. 275, 281 (1978).

37. *In re Ramon M.*, 22 Cal. 3d 419, 428, 584 P.2d 524, 530, 149 Cal. Rptr. 387, 393 (1978) (quoting *McDonald v. United States*, 312 F.2d 847, 854 (1962)). It is important to note that although the *McDonald* definition of mental defect includes a volitional aspect, California's test for legal insanity does not. *See* CAL. PENAL CODE § 25 (West 1999 & Supp. 2003).

38. *See People v. Fields*, 35 Cal. 3d 329, 370, 673 P.2d 680, 706, 197 Cal. Rptr. 803, 829-30 (1983).

Clearly, a defendant who has been medically diagnosed with a mental illness, such as paranoid schizophrenia, may be able to successfully present an insanity defense, provided that he can also meet the other requirements of section 25.<sup>39</sup> Less clear, however, are cases where a defendant claims to be insane, but the "insanity" is the result of the defendant's voluntary use of drugs and/or alcohol.<sup>40</sup>

Can a defendant who is "temporarily insane" due to voluntary intoxication raise a successful insanity defense? Early cases held that voluntary intoxication could induce insanity that would relieve a defendant of criminal responsibility if the insanity was of a "settled" nature.<sup>41</sup>

Over half a century later, the California Supreme Court was called upon to explain the meaning of settled insanity. In *People v. Kelly*, the court was asked to determine whether an eighteen-year-old defendant, who had been continuously using hallucinogenic drugs for approximately one year prior to attacking her mother, could have been legally insane at the time she "repeatedly stabb[ed] her [mother] with an array of kitchen knives."<sup>42</sup> Despite expert testimony that the defendant suffered from an organic brain defect caused by the drugs that rendered her "dingy,"<sup>43</sup> the trial court held that the defendant could not meet the definition of legal insanity because her condition was not settled and permanent.<sup>44</sup>

According to the *Kelly* court, the trial court was mistaken in construing "settled" to mean only "permanent."<sup>45</sup> The term "settled" was apparently broad enough to include both permanent and temporary insanity.<sup>46</sup>

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39. See generally LAWRIE REZNEK, *EVIL OR ILL?: JUSTIFYING THE INSANITY DEFENCE* 275 (Routledge ed., 1997) ("When . . . insanity acquittees were matched for the same offenses with those whose insanity plea had failed, being psychotic [(schizophrenic)] predicted 81 percent of the acquittals."). But see *infra* Section D (discussing the role of expert testimony).

40. See, e.g., *People v. Kelly*, 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (1973); *People v. Travers*, 88 Cal. 233, 26 P. 88 (1891).

41. See, e.g., *Travers*, 88 Cal. at 233, 26 P. at 88.

42. See *Kelly*, 10 Cal. 3d at 568, 516 P.2d at 877, 111 Cal. Rptr. at 173.

43. *Id.* at 569 n.6, 516 P.2d at 877 n.6, 111 Cal. Rptr. at 173 n.6.

44. *Id.* at 574-75, 516 P.2d at 881-82, 111 Cal. Rptr. at 177-78.

45. *Id.* at 576-77, 516 P.2d at 882-84, 111 Cal. Rptr. at 178-80.

46. Under *Kelly*, so long as the defendant's insanity, even if it is the product of voluntary use of drugs and/or alcohol, existed prior to and persisted after the offense with which the defendant is charged, the insanity qualifies as settled.

b. "temporary" insanity redefined

Under the reasoning of *Kelly*, a defendant may be excused from criminal liability if he committed crimes while insane, even if the insanity was only temporary, as long as that insanity was of a settled nature.<sup>47</sup> However, section 25.5 of California's Penal Code makes the insanity defense unavailable to defendants whose insanity is

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*See id.* Thus, the defendant may well have been insane when she stabbed her mother, for it would make "no difference whether the period of insanity lasted several months, as in this case, or merely a period of hours." *Id.* at 576-77, 516 P.2d at 883, 111 Cal. Rptr. at 179. Section 25.5 expressly overrules this type of reasoning. *See* CAL. PENAL CODE § 25.5 (West 1999 & Supp. 2003); *see also infra* Section A.1.a (discussing "temporary insanity").

47. Despite the trial court's conclusion that his insanity was not settled, the defendant in *People v. Skinner* attempted to persuade the court of appeal that he came within the *Kelly* definition of insanity, particularly the part of that definition that seemingly recognized a form of insanity that lasts only for a period of hours but would, nonetheless, be "settled" for the purposes of section 25. *See People v. Skinner*, 185 Cal. App. 3d 1050, 1062, 288 Cal. Rptr. 652, 660 (1986). The defendant appealed his conviction for murder after bludgeoning his wife with a wine bottle and then slashing her throat with its broken shards following an all-night freebasing binge. At trial, expert testimony was given to the effect that the defendant's ingestion of cocaine produced a mental condition that persisted over time, rendering the defendant unable to distinguish right from wrong. On appeal, the court expanded upon the *Kelly* definition of "settled":

"Under *People v. Kelly*, when an effort is made to establish insanity due to alcohol, it must be shown that there exists a "settled insanity" and not the type of a temporary mental condition produced by current use of alcohol. In other words, your friendly local lush cannot get sloshed, commit a horrendous crime and slip into a state hospital free from criminal sanctions. If an alcoholic wants to use his [or her] problem as an escape hatch, he [or she] must drink enough to develop a mental disorder that continues when he [or she] is stone sober even though the damage is not permanent in the sense that it is beyond repair. *Kelly* offers us the only escape from a completely absurd situation in which those who produce distorted mental conditions by the use of such mindbenders as acid, speed, angel dust or alcohol, then commit bizarre, dangerous and ugly acts could escape criminal sanctions on the basis that their self-induced mental conditions produced an incapacity to appreciate the criminality of their conduct."

*Id.* at 288 Cal. Rptr. at 659 (citations omitted) (quoting *People v. McCarthy*, 110 Cal. App. 3d 296, 299-300, 167 Cal. Rptr. 772, 774 (1980).

The court affirmed the conviction based on evidence that the defendant's "insanity" was merely temporarily induced by his contemporaneous ingestion of cocaine, and consequently did not meet the legal definition of insanity. *See id.* at 1063, 288 Cal. Rptr. at 660-61.

solely the result of voluntary ingestion of drugs and/or alcohol.<sup>48</sup> Section 25.5 significantly narrows the availability of the insanity defense because “temporary” insanity now excuses criminal behavior only if it is at least in part the result of an organic mental disease or defect.<sup>49</sup>

Section 25.5 was first interpreted by the California Court of Appeal in *People v. Robinson*.<sup>50</sup> The court read the statute as changing the then-existing law, which allowed defendants to show that their insanity was of a settled nature, even if the insanity was caused solely by the voluntary ingestion of intoxicants.<sup>51</sup> The *Robinson* court held:

[The] statute makes no exception for brain damage or mental disorders caused solely by one’s voluntary substance abuse but which persists after the immediate effects of the intoxicant have dissipated. Rather, it erects an absolute bar prohibiting the use of one’s voluntary ingestion of intoxicants as the sole basis for an insanity defense, regardless of whether the substances caused organic damage or a settled mental defect or disorder which persists after the immediate effects of the intoxicant have worn off. In other words, if an alcoholic or drug addict attempts to use his problem as an escape hatch, he will find that section 25.5 has shut and bolted the opening.<sup>52</sup>

The court went on to explain that the change in the law reflected the legislative determination that a criminal defendant, who is rendered insane by voluntary substance abuse, should be treated differently from a criminal defendant who is “afflicted by mental illness through no conscious volitional choice on their part.”<sup>53</sup>

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48. See CAL. PENAL CODE § 25.5.

49. See *id.*

50. 72 Cal. App. 4th 421, 84 Cal. Rptr. 2d 832 (1999).

51. See *id.*

52. *Id.* at 427, 84 Cal. Rptr. 2d at 836.

53. *Id.* at 428, 84 Cal. Rptr. 2d at 837. The court also noted that section 25.5 was passed after the implementation of California’s Three Strikes Law in anticipation of an increase in the number of criminal defendants claiming not guilty by reason of insanity in order to avoid life sentences imposed as a result of the new sentencing laws. See *id.* at 427, 84 Cal. Rptr. 2d at 836.

In response to the holding of *People v. Robinson*, the jury instructions given in cases where a criminal defendant has invoked the insanity defense were revised to read:

A person is legally insane if, by reason of mental disease or mental defect, either temporary or permanent, caused in part by the long continued use of [alcohol] [drugs] [narcotics], even after the effects of recent use of [alcohol] [drugs] [narcotics] have worn off, [he][she] was incapable at the time of the commission of the crime of either:

1. Knowing the nature and quality of [his][her] act; or
2. Understanding the nature and quality of [his][her] act; or
3. Distinguishing right from wrong.

[However, this defense does not apply when the sole or only basis or causative factor for the mental disease or mental defect is an addiction to, or an abuse of, intoxicating substances.]<sup>54</sup>

Thus, although a defense of temporary settled insanity is still viable, the meaning of “settled” has changed. The *Robinson* case, section 25.5 of California’s Penal Code, and California jury instruction Criminal No. 4.02 all illustrate that the insanity contemplated by California’s insanity defense leaves little hope for a defendant unless he suffers from an organic mental defect or illness.

## 2. The act prong

The act prong, the first express prong of section 25, requires that a defendant prove that “he or she was incapable of knowing or understanding the nature or quality of his or her act . . . at the time of

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54. CALJIC, *supra* note 21, no. 4.02. Prior to *Robinson*, the instruction read:

A person is legally insane if, by reason of mental disease or mental defect, either temporary or permanent, caused by the long continued use of [alcohol] [drugs] [narcotics], even after the effects of recent use of [alcohol] [drugs] [narcotics] have worn off, [he][she] was incapable at the time of the commission of the crime of either:

1. Knowing the nature and quality of [his][her] act; or
2. Understanding the nature and quality of [his][her] act; or
3. Distinguishing right from wrong.

*Id.*



the commission of the offense.”<sup>55</sup> This requirement is met if, to use a familiar if simplistic illustration, a defendant believed he was squeezing a lemon, when in fact he was wringing the neck of a victim.<sup>56</sup> The lemon-squeezing defendant does not know the true nature of his act, and he is legally insane as a result.<sup>57</sup>

Courts have not often found defendants insane under this prong. For example, the defendant in *People v. Horn* was unable to meet this prong in her trial for vehicular manslaughter.<sup>58</sup> After pulling into a service station for gas and filling her tank, the defendant attempted to pay for the gas with her Automobile Club card.<sup>59</sup> Upon refusal by the gas station attendant, the defendant got into her car and drove away without paying. With the attendant in pursuit, the defendant sped through a red light and into an intersection at 60 miles per hour, striking and killing a motorcyclist.<sup>60</sup> In the appellate proceeding following her conviction, the court commented that there was no evidence in the record that the defendant could not understand the nature of her act—she knew she was driving in her car, she knew she was being followed, and she knew that the light was red before she entered the intersection.<sup>61</sup> Hence, the defendant was not relieved of criminal responsibility under the act prong of section 25.

In *People v. Skinner*, the court followed a similar analysis.<sup>62</sup> Skinner was charged with first-degree murder and attempted murder after he repeatedly struck his wife in the head with a wine bottle and then slashed her throat in order, according to the defendant, to assist her in her quest for spiritual ascendancy.<sup>63</sup> Police arrested Skinner when he drove across the center lane of a highway, stopped his car across two lanes of traffic, and proceeded to walk towards the

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55. CAL. PENAL CODE § 25 (West 1999 & Supp. 2003).

56. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 25.07[C][1] (2d ed. 1995).

57. *See id.*

58. 158 Cal. App. 3d 1014, 1020, 205 Cal. Rptr. 119, 122 (1984).

59. *See id.* at 1018, 205 Cal. Rptr. at 121.

60. *See id.*

61. *See id.* at 1033–34, 205 Cal. Rptr. at 132.

62. 185 Cal. App. 3d 1050, 1056, 228 Cal. Rptr. 652, 656 (1986).

63. *See id.* This case, involving defendant Raymond Skinner, should not be confused with the case involving defendant Jesse Skinner, which is discussed in the wrongfulness prong section *infra* Section A.3.

oncoming cars.<sup>64</sup> When apprehended, Skinner told the police that he had just killed his wife, and requested that the arresting officer kill him.<sup>65</sup> At the time of his arrest, Skinner was on his way to the home of his children in order to “assist” them in the same manner he had assisted his wife.<sup>66</sup> Like the *Horn* court, the *Skinner* court reasoned that Skinner knew what he was doing when he killed his wife—he knew he was holding a bottle, and he knew that by hitting his wife in the head with the bottle repeatedly, and then cutting her throat with the broken bottle, he would cause her death.<sup>67</sup> Consequently, Skinner was unable to convince the court that he did not know or appreciate the quality of his act, and he was unable to satisfy the act prong of section 25.<sup>68</sup>

As the above examples illustrate, it is difficult for a defendant to meet the act prong of section 25. In other words, it is rare that a defendant will not have realized what he was actually doing. For this to be the case, a defendant would have to be delusional, so that he did not know that he was committing an act of homicide.<sup>69</sup> To further illustrate: A defendant who kills his neighbor because he labors under a delusion that the neighbor was trampling his flowerbeds may indeed be deluded if the neighbor was not actually trampling the flowers. However, the delusion does not relieve the defendant of responsibility for the killing because even under the defendant’s deluded version of the facts he is still killing the neighbor.<sup>70</sup>

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64. *See id.* at 1052, 228 Cal. Rptr. at 653.

65. *See id.*

66. *See id.* at 1056, 228 Cal. Rptr. at 655.

67. *See id.* at 1061, 228 Cal. Rptr. at 659.

68. *See id.*

69. *See* M’Naghten’s case, 8 Eng. Rep. 718, 719–21 (1843). Here, M’Naghten would arguably fail the test that bears his name had his delusion not also provided him with the additional justification of self-defense. M’Naghten was well aware that by shooting his victim he was committing an act of homicide; he was only deluded as to the identity of his victim and his perception that the victim was persecuting him. *See id.* M’Naghten believed that the man he killed was going to shoot him, and thus, the homicide was justified. *See id.*; *see also* *People v. Horn*, 158 Cal. App. 3d 1014, 1021, 205 Cal. Rptr. 119, 123 (1984) (discussing M’Naghten’s case).

70. Although intellectually it makes sense that a defendant with a cognitive impairment has altered perceptions of his actions such that he thinks he is doing one thing when he is really doing another, this is not how cognitive impairment plays out in life. *See* Marc Rosen, *Insanity Denied: Abolition of*

### 3. The wrongfulness prong

The wrongfulness prong of section 25, which requires that a defendant be “incapable of . . . distinguishing right from wrong at the time of the commission of the offense”<sup>71</sup> is much more frequently used by defendants in order to fall within California’s test for legal insanity.<sup>72</sup> It is relatively easier to satisfy than the act prong<sup>73</sup> because insane people almost always know what they are doing; they are simply unable to appreciate that they should not perform the act because the act is “wrong.”<sup>74</sup> The word “wrong” encompasses two discrete meanings: (1) that which is legally wrong; and (2) that which is morally wrong.<sup>75</sup> Theoretically, simply asking a defendant whether he knows that the act with which he is charged is a criminal offense may show that the defendant is aware that this act is legally wrong; a “yes” answer would preclude finding a defendant insane if legality were the only aspect of wrong with which courts were concerned.<sup>76</sup> Such a simplistic interpretation of “wrong” is not the state of the law.<sup>77</sup>

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*the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL’Y 253, 257 (1999) (explaining that “disordered persons’ acts are willed even if they are the result of crazy reasons or compulsion” and that “virtually all people know . . . what they are doing and intend to do it.”); *see also* Morse, *supra* note 3, at 810–11 (explaining that most insane defendants have general knowledge of their actions, but are motivated to commit the acts by irrational perceptions of reality).

71. CAL. PENAL CODE § 25 (West 1999 & Supp. 2003).

72. *See* DRESSLER, *supra* note 56, § 25.04[C][1][a].

73. This is not to suggest that it is easy to meet—both are hard to satisfy, which is why the defense is rarely used and even more rarely successful. “[T]he insanity defense is raised in fewer than two percent of federal and state trials and is rarely successful . . . [It] is a defense of last resort that betokens an otherwise weak defense and that rarely succeeds.” *See* Morse, *supra* note 3, at 797.

74. *See id.*

75. *See generally* *People v. Stress*, 205 Cal. App. 3d 1259, 252 Cal. Rptr. 913 (1988) (discussing the difference between legal and moral wrong).

76. *See generally* *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964) (discussing the addition of the terms “understand” and “appreciate” to the test for insanity, suggesting that mere knowledge that an act is illegal would not subject an otherwise insane defendant to criminal liability if he did not also understand *why* the act is illegal, or appreciate the consequences of his actions); *see also* *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959); *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949)

*a. legal wrong*

Although what is legally wrong frequently encompasses what is morally wrong,<sup>78</sup> they are not necessarily equivalent.<sup>79</sup> For example, a defendant may understand that killing someone is illegal. However, if he feels he has been commanded by God to kill, he may not believe that it is morally wrong.<sup>80</sup> Consequently, it is not enough for the prosecution to show that the defendant was aware of the criminal nature of the act if it cannot also show that the defendant did not believe the act was morally wrong.<sup>81</sup>

The California Supreme Court echoed this reasoning in *People v. Skinner*.<sup>82</sup> There, the defendant was convicted of murdering his wife because he believed that the marriage vow “till death do us part” bestowed upon him a God-given right to kill his wife when he became inclined to violate his vows.<sup>83</sup> In response to arguments that the California version of the M’Naghten test for legal insanity contemplates only that the prosecution show that a defendant is aware of the criminal nature of his acts before he can be found sane, the court concurred with jurisdictions that addressed the same issue

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(discussing the requirement that the defendant not only know his act is illegal, but also that he *understand* the nature and quality of his act).

77. See *infra* Sections A.3.a and A.3.b (discussing the difference between legal and moral wrong).

78. See *People v. Skinner*, 39 Cal. 3d 765, 783–84, 704 P.2d 752, 764, 217 Cal. Rptr. 685, 696 (1985).

79. See *Stress*, 205 Cal. App. 3d at 1272–75, 252 Cal. Rptr. at 921–24.

80. This is also an example of a particular variety of insanity defense known as the “deific decree.” Under the deific decree defense, a defendant is not held responsible for his act if he can show that his act was the result of an insane delusion that he has been commanded by God to commit the act. See Christopher Hawthorne, Comment, “Deific Decree”: *The Short, Happy Life of a Psuedo-Doctrine*, 33 LOY. L.A. L. REV. 1755, 1755 (2000). California courts do not accept deific decree defense, though the M’Naghten test for insanity may encompass it under the moral wrong prong. See *infra* Section A.3.b.

81. See *Skinner*, 39 Cal. 3d at 783–84, 704 P.2d at 764, 217 Cal. Rptr. at 696; see also *Stress*, 205 Cal. App. 3d at 1275, 252 Cal. Rptr. at 923–24 (holding that the defendant may have believed his acts were illegal yet not morally wrong and that a proper standard for determining the defendant’s sanity must include an understanding of moral wrong).

82. *Skinner*, 39 Cal. 3d at 783–84, 704 P.2d at 764, 217 Cal. Rptr. at 696. This case involving Jesse Skinner should not be confused with that of Raymond Skinner, discussed *supra* Part X.A.2.

83. See *id.* at 770, 704 P.2d at 754–55, 217 Cal. Rptr. at 687.

and concluded that "a defendant who is incapable of understanding that his act is morally wrong is not criminally liable merely because he knows the act is [legally] wrongful."<sup>84</sup>

The court of appeal followed suit in *People v. Stress*. There the defendant was convicted of first-degree murder after striking his wife in the head with an axe.<sup>85</sup> The court found that the trial court erred in construing the "wrong" referred to in section 25 as merely that which is illegal.<sup>86</sup> Under that erroneous construction of wrongfulness, the trial court found the defendant sane because he understood at the time he killed his wife that his behavior was criminal.<sup>87</sup> Indeed, it was precisely the criminal nature of the act and its expected repercussions that led the defendant to kill his wife: he believed that he would thereby gain a forum in which to publicly voice his theory that the government and professional sports associations had conspired to keep professional athletes out of the Vietnam draft.<sup>88</sup> The defendant argued, and the court of appeal agreed, that the notion of wrong articulated by section 25 encompasses moral as well as legal wrong.<sup>89</sup> In light of this interpretation and evidence in the record that supported the theory that the defendant believed killing his wife was not morally wrong,<sup>90</sup> the court of appeal reversed the trial court's sanity verdict and remanded the case for further proceedings consistent with its interpretation of "wrong."<sup>91</sup>

*b. moral wrong*

Though the *Skinner* and *Stress* courts clarified that the wrong contemplated by the California test for insanity encompasses both legal and moral wrong, those cases did little to elaborate upon the appropriate standard for determining whether the defendant's belief

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84. *See id.* at 783, 704 P.2d at 764, 217 Cal. Rptr. at 697.

85. *Stress*, 205 Cal. App. 3d at 1263, 252 Cal. Rptr. at 915.

86. *See id.* at 1274, 252 Cal. Rptr. at 922-23.

87. *See id.* at 1273, 252 Cal. Rptr. at 921-22.

88. *See id.* at 1263, 252 Cal. Rptr. at 915.

89. *See id.* at 1272, 252 Cal. Rptr. at 920-21.

90. The defendant believed his wife's death was a sacrifice, that she died as a soldier, and that no jury would convict him when he exposed the conspiracy. *See id.* at 1273, 1275, 252 Cal. Rptr. at 922, 924.

91. *Id.* at 1275, 252 Cal. Rptr. at 924.

that his act was not morally wrong will excuse him from criminal liability.<sup>92</sup>

Adding yet another wrinkle to the test for legal insanity, California courts require not only the defendant's inability to distinguish between what is morally right and wrong, but also that the morality of the defendant reflect "generally accepted ethical or moral principals derived from an external source."<sup>93</sup> Stated another way, if a defendant's sense of morality is at variance with accepted societal notions of morality, then the defendant may not be relieved of criminal liability by compelling a finding of legal insanity.<sup>94</sup>

Under one interpretation of this requirement, a defendant who suffers from an insane delusion that *his* God had commanded him to kill would not be found legally insane if his God was not *the* God, i.e., the insanity defense excuses only acts performed as the result of delusions of commands from the Judeo-Christian God. A less

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92. In a footnote, the *Skinner* court alluded to the matter when it quoted Justice Cardozo's *People v. Schmidt* opinion:

"[I]t is not enough that [the defendant] has views of right and wrong at variance with those that find expression in the law. The variance must have its origin in some disease of the mind. The anarchist is not at liberty to break the law because he reasons that all government is wrong. The devotee of a religious cult that enjoins polygamy or human sacrifice as a duty is not thereby relieved from responsibility before the law."

*People v. Skinner*, 39 Cal. 3d 765, 784 n.16, 704 P.2d 752, 764, 217 Cal. Rptr. 685, 697 n.16 (1985).

Though Justice Cardozo's discussion speaks to the requirement that a defendant's inability to tell right from wrong be caused by a mental defect, his comments foreshadow a dilemma that is later addressed by California courts—that posed by the defendant who does not see his act as morally wrong, but subscribes to a morality that differs from that which is accepted by society at large. See *People v. Coddington*, 23 Cal. 4th 529, 2 P.3d 1081, 97 Cal. Rptr. 2d 528 (2000) (holding that defendant's version of morality could not excuse him from criminal liability because it did not conform with that subscribed to generally by society).

93. *Coddington*, 23 Cal. 4th at 608, 2 P.3d at 1143, 97 Cal. Rptr. 2d at 597; see also *Stress*, 205 Cal. App. 3d at 1274, 252 Cal. Rptr. at 923 ("[M]oral obligation in the context of the insanity defense means generally accepted moral standards and not those standards peculiar to the accused.").

94. See *Coddington*, 23 Cal. 4th at 608, 2 P.3d at 1143, 97 Cal. Rptr. 2d at 597; see also *People v. Rittger*, 54 Cal. 2d 720, 734, 355 P.2d 645, 653, 7 Cal. Rptr. 901, 909 (1960) ("The fact that a defendant claims and believes that his acts are justifiable according to his own distorted standards does not compel a finding of legal insanity.").

inflammatory explanation of this result is that the Judeo-Christian God is a proxy for generally held precepts of morality. Thus, excusing acts done by insane defendants who feel their conduct was prescribed by *the* God, but not those by insane defendants whose conduct is proscribed by some other god is simply a short hand way of saying that the former believed what he was doing was right, and that his "right" is recognized by society; while, though the latter also believed what he was doing was right, that his "right" is *not* recognized by society.<sup>95</sup>

In *People v. Coddington*, the California Supreme Court addressed a distorted sense of morality and held that the trial court reasonably determined there was no support for a finding of legal insanity.<sup>96</sup> In *Coddington*, Herbert James Coddington was convicted of kidnapping, rape, and murder after luring two teenage models and their chaperones to his mobile home for what they believed would be the filming of an anti-drug film.<sup>97</sup> Once the women arrived at the trailer, the defendant immediately strangled the chaperones, and then repeatedly raped and sexually assaulted the models.<sup>98</sup> The defendant was convicted by the trial court despite his contention that he was insane at the time he committed the acts, and that he had been instructed through a series of traffic signals to lure the women to his home and rape them. The court of appeal upheld the sanity verdict because it appeared that the defendant's religion was not external to him, but was rather his own aberrant version of a universal order.<sup>99</sup> Indeed, there was evidence in the record to suggest that the defendant had rejected the Judeo-Christian concept of God and the moral system associated therewith, and that he subscribed to a notion of God as a force running through the universe.<sup>100</sup> Thus, the jury was justified in finding the defendant legally sane at the time he committed the acts because there was reason to believe that even if he were unable to distinguish right from wrong due to a mental

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95. See *Coddington*, 23 Cal. 4th at 608–10, 2 P.3d at 1143–45, 97 Cal. Rptr. 2d at 597–99.

96. *Coddington*, 23 Cal. 4th at 608–10, 2 P.3d at 1143–45, 97 Cal. Rptr. 2d at 597–99.

97. See *id.* at 547, 2 P.3d at 1104, 97 Cal. Rptr. at 553.

98. See *id.* at 549–53, 2 P.3d at 1105–07, 97 Cal. Rptr. at 554–56.

99. See *id.* at 610, 2 P.3d at 1145, 97 Cal. Rptr. at 599.

100. See *id.* at 609, 2 P.3d at 1144, 97 Cal. Rptr. at 598; see *supra* text accompanying note 71.

disease or defect, the defendant's concept of morality was such that would not bring him within the definition of legal insanity.<sup>101</sup> It is not enough for a defendant to claim he thought what he did was morally "right." To be relieved of criminal responsibility, the defendant's notion of "right" must square with the jury's notion of "right."

### B. Procedure

#### 1. Competency to stand trial

When a defendant pleads not guilty by reason of insanity, there is often doubt as to whether the defendant is fit to stand trial for the crimes with which he is charged.<sup>102</sup> If such a doubt arises, the defendant's competency to stand trial must be assessed in a separate proceeding before the trial on the issues of guilt and sanity may proceed.<sup>103</sup> The competency hearing can also be understood as a determination of the defendant's *present* sanity,<sup>104</sup> as opposed to the sanity of the defendant at the time of the commission of the crime.

The purpose of ensuring that a defendant is competent to stand trial echoes that of the insanity defense generally—those who cannot understand either what they have done or the consequences of their actions should not be held accountable in the same manner as those who have such an understanding.<sup>105</sup> The competency requirement is predicated upon both state and federal constitutional law, which give a criminal defendant the right to appear and defend in person.<sup>106</sup> Mere physical presence, however, does not satisfy this constitutional mandate.<sup>107</sup> Such presence, "without mental realization of what was going on would obviously be of no value to the accused" and would

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101. See *Coddington*, 23 Cal. 4th at 659, 2 P.3d at 1177, 97 Cal. Rptr. at 634.

102. See, e.g., *People v. Lawley*, 27 Cal. 4th 102, 38 P.3d 461, 115 Cal. Rptr. 2d 614 (2002); *People v. Weaver*, 26 Cal. 4th 876, 29 P.3d 103, 111 Cal. Rptr. 2d 2 (2001); *People v. Pennington*, 66 Cal. 2d 508, 426 P.2d 942, 58 Cal. Rptr. 374 (1967); *In re Dennis*, 51 Cal. 2d 666, 335 P.2d 657 (1959).

103. CAL. PENAL CODE §§ 1367, 1368 (West 2000 & Supp. 2003).

104. See *Pennington*, 66 Cal. 2d at 518, 426 P.2d at 949, 58 Cal. Rptr. at 381.

105. See *Morse*, *supra* note 3, at 783.

106. See U.S. CONST. amend. VI; CAL. CONST. art. I, § 15; CAL. PENAL CODE § 1043.

107. See *In re Dennis*, 51 Cal. 2d at 672, 335 P.2d at 660.



lead to the absurd result of a "purported trial of . . . an insane person without the least understanding of what was taking place in the courtroom."<sup>108</sup>

Constitutional demands and moral concerns with accountability are satisfied only when the defendant is able to both understand the nature of the proceeding, and to rationally participate in his own defense.<sup>109</sup> If at any point during a criminal proceeding there is doubt that the defendant meets this standard for competency, the trial judge must suspend the criminal proceeding.<sup>110</sup> The issue of competency, or present sanity, is then tried in a separate civil proceeding where the defendant is presumed competent unless proven otherwise by a preponderance of the evidence.<sup>111</sup>

Under section 1368 of the California Penal Code, the trial judge must be the one to doubt the defendant's competency to stand trial,<sup>112</sup> not the defense counsel or any third person.<sup>113</sup> However, section 1368 contemplates that the trial judge will order a competency hearing if informed by defense counsel that counsel harbors doubts

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108. *Id.*

109. See CAL. PENAL CODE §§ 1367, 1368; see also *People v. Lawley*, 27 Cal. 4th 102, 38 P.3d 461, 115 Cal. Rptr. 2d 614 (2002); *People v. Weaver*, 26 Cal. 4th 876, 29 P.3d 103, 111 Cal. Rptr. 2d 2 (2001); *People v. Pennington*, 66 Cal. 2d 508, 426 P.2d 942, 58 Cal. Rptr. 374 (1967); *In re Dennis*, 51 Cal. 2d at 666, 335 P.2d at 657 (all interpreting section 1368 as requiring that the defendant appreciate the nature of the proceeding). Some courts have interpreted section 1368 as also requiring that the defendant understand the purpose of the proceeding. See, e.g., *Pennington*, 66 Cal. 2d at 515, 426 P.2d at 947, 58 Cal. Rptr. at 379; *People v. Merkouris*, 52 Cal. 2d 672, 678, 344 P.2d 1, 4 (1959); *In re Dennis*, 51 Cal. 2d at 670, 335 P.2d at 659. As with insanity at the time of the act with which the defendant is charged, incompetence must be the result of mental disorder or developmental disability. See CAL. PENAL CODE § 1367(a). Furthermore, the inability to participate in the proceeding that the statute contemplates does not include differences of opinion on tactical approaches to the defense. See, e.g., *Lawley*, 27 Cal. 4th at 129, 38 P.3d at 480, 115 Cal. Rptr. 2d at 636 (defendant's preference for a bench trial over a jury trial, though derived from a distrust of lesbian and transvestite jurors, was a difference of opinion about tactics, not a manifestation of the defendant's inability to assist in his defense).

110. CAL. PENAL CODE § 1368.

111. See *id.*; *Lawley*, 27 Cal. 4th at 131, 38 P.3d at 482, 115 Cal. Rptr. 2d at 638. California Jury Instructions define a preponderance of the evidence as evidence that has more convincing force than that opposing it. CALJIC, *supra*, note 21, no. 2.50.2.

112. CAL. PENAL CODE § 1368(a).

113. See *In re Dennis*, 51 Cal. 2d at 670, 335 P.2d at 659.

as to the present sanity or competency of the defendant.<sup>114</sup> Read together, sections 1368(a) and (b) require a competency hearing whenever the trial judge doubts the defendant's competence, or when counsel informs the judge that the defendant is not competent.<sup>115</sup>

Nevertheless, even when the trial court does not doubt the present sanity of the defendant and has not been informed by counsel of any competency concerns, the defendant may still be constitutionally entitled to a competency hearing if substantial evidence of the defendant's incompetence exists.<sup>116</sup> Denial of a competency hearing in the face of such substantial evidence may be grounds for reversal of a conviction if the defendant is found to be sane and then convicted.<sup>117</sup>

California trial courts have made some surprising decisions regarding a defendant's competency to stand trial. For instance, in *People v. Pennington*, the defendant appealed his conviction for first-degree murder on grounds that he had been denied a competency hearing over a defense motion.<sup>118</sup> Evidence of the defendant's alleged incompetence included expert testimony that during the course of the trial, the defendant believed that he spoke with both his dead grandmother and the devil, whom he described as having "real nice eyes, . . . curly hair, and . . . little horns;"<sup>119</sup> and the defendant's unusual behavior, which included outbursts in the courtroom that led to the defendant being gagged, and an episode in which defendant displayed his penis and shouted, "come and bring Cracker Jack."<sup>120</sup> Despite these indications that the defendant may not have been sane during the trial, the trial judge stated that "this Court does not have a doubt and has not had a doubt" that the defendant was competent to stand trial.<sup>121</sup>

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114. CAL. PENAL CODE § 1368(b).

115. CAL. PENAL CODE § 1368(a)-(b).

116. See, e.g., *Lawley*, 27 Cal. 4th at 131, 38 P.3d at 482, 115 Cal. Rptr. 2d at 638; *People v. Weaver*, 26 Cal. 4th 876, 910, 29 P.3d 103, 120, 111 Cal. Rptr. 2d 2, 23 (2001); *People v. Pennington*, 66 Cal. 2d 508, 518-19, 426 P.2d 942, 949, 58 Cal. Rptr. 374, 381 (1967).

117. See *Pennington*, 66 Cal. 2d at 520-21, 426 P.2d at 950-51, 58 Cal. Rptr. at 382-83.

118. See *id.* at 511, 426 P.2d at 944, 58 Cal. Rptr. at 376.

119. *Id.* at 515 n.5, 426 P.2d at 946-47, 58 Cal. Rptr. at 378-79.

120. *Id.* at 513, 426 P.2d at 945, 58 Cal. Rptr. at 377.

121. *Id.*, 426 P.2d at 946, 58 Cal. Rptr. at 378.

The Supreme Court of California disagreed and held that the denial of the motion in the face of substantial evidence of incompetence, even absent a doubt in the mind of the trial judge, amounted to a denial of due process.<sup>122</sup>

Clearly, the *Pennington* court found the aforementioned evidence of the defendant's incompetence substantial. It did not, however, define for the lower courts what other types of evidence should be considered substantial. The California Supreme Court finally did so decades later in *People v. Danielson*. There, the Supreme Court held that evidence is substantial if it raises a reasonable doubt about the defendant's competence to stand trial.<sup>123</sup> It affirmed this definition in *People v. Marshall*, where it held that substantial evidence which requires a hearing on competency is that which is reasonable, credible, and of solid value.<sup>124</sup>

The California Supreme Court applied this standard in *People v. Lawley*. There, the defendant was adamantly opposed to having women on the jury at his trial.<sup>125</sup> The court did not consider expert testimony that the defendant believed that many women who wear pants are either transvestites or lesbians, and that all women who are transvestites or lesbians also molest children to be substantial evidence of possible incompetence.<sup>126</sup> The court accepted the trial court's characterization of this evidence as illustrating mere differences of opinion between the defendant and his counsel over

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122. See *id.* at 518, 426 P.2d at 949, 58 Cal. Rptr. at 381. Failure to order a competency hearing in the face of substantial evidence of incompetence robs the defendant of his right to a fair trial, and thus amounts to a denial of due process. See *id.* In reaching this conclusion, the court followed the reasoning of the recent United States Supreme Court decision *Pate v. Robinson*, 383 U.S. 375 (1966) (holding that a criminal defendant has a constitutional right to a competency hearing if he presents substantial evidence of incompetence). In *Robinson*, evidence of the defendant's present insanity included his mother's testimony that she had once observed him "' a little foamy at the mouth.'" See *Pennington*, 66 Cal. 2d at 517 n.7, 426 P.2d at 948 n.7, 58 Cal. Rptr. at 380 n.7 (quoting *Robinson*, 383 U.S. at 378-82).

123. 3 Cal. 4th 691, 726, 838 P.2d 729, 749, 13 Cal. Rptr. 2d 1, 21 (1992) (*overruled on other grounds by Price v. Superior Court*, 25 Cal. 4th 1046, 1069 n.13, 25 P.3d 618, 633, 108 Cal. Rptr. 2d 409, 427 (2001)).

124. 15 Cal. 4th 1, 31, 931 P.2d 262, 278, 61 Cal. Rptr. 2d 84, 100 (1997).

125. 27 Cal. 4th 102, 128, 38 P.3d 461, 480, 115 Cal. Rptr. 614, 636 (2002).

126. See *id.* at 128 n.7, 38 P.3d at 480 n.7, 115 Cal. Rptr. at 636 n.7. Strangely, the expert also testified that defendant's thinking revealed "nothing bizarre or grossly illogical." *Id.*

tactical decisions.<sup>127</sup> Because such differences of opinion do not constitute an inability to rationally participate in one's defense, this evidence did not ultimately convince the court that the defendant was not sane at the time of the trial. The decision of the trial court was upheld.<sup>128</sup>

## 2. Bifurcated trial

Once the defendant is found competent to stand trial, the criminal trial proceeds.

The trial of a defendant who pleads both not guilty and not guilty by reason of insanity takes place in two phases—the guilt phase and the sanity phase.<sup>129</sup> Though often referred to as separate trials,<sup>130</sup> the guilt and sanity phases are actually two parts of one proceeding.<sup>131</sup> During the guilt phase of the trial, the defendant is presumed sane, and any evidence of legal insanity is inadmissible.<sup>132</sup> If the jury returns a verdict of not guilty during the guilt phase, the defendant is acquitted of the charges against him. If, however, the jury returns a guilty verdict, the sanity of the defendant is then tried.<sup>133</sup>

## 3. Pleas

A defendant may plead both not guilty and not guilty by reason of insanity.<sup>134</sup> Such a plea in effect allows the defendant two chances to avoid criminal punishment for the acts with which he is

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127. See *id.* at 134–35, 426 P.2d at 484, 58 Cal. Rptr. at 641–42; see also *supra* note 105 (discussing the nature of the basis for incompetence under CAL. PENAL CODE § 1368 (West 2000 & Supp. 2003)).

128. See *Lawley*, 27 Cal. 4th at 130, 426 P.2d at 481, 58 Cal. Rptr. at 638.

129. See CAL. PENAL CODE § 1026 (West 1985 & Supp. 2003).

130. See *id.*

131. See *People v. Villarreal*, 167 Cal. App. 3d 450, 458, 213 Cal. Rptr. 179, 184 (1985) (“In the eyes of the law there is only one trial even though it is divided into two sections or stages if insanity is pleaded as a defense.”) (citing *People v. Wells*, 33 Cal. 2d 330, 349, 202 P.2d 53, 65 (1949)).

132. See CAL. PENAL CODE § 1026; *Villarreal*, 167 Cal. App. 3d at 455, 213 Cal. Rptr. at 181–82; see also *People v. Hernandez*, 22 Cal. 4th 512, 523, 994 P.2d 354, 360, 93 Cal. Rptr. 2d 509, 516 (2000) (explaining that the trial of an insanity plea is not a separate action).

133. See CAL. PENAL CODE § 1026.

134. See *id.*

charged.<sup>135</sup> Even if the defendant is found guilty during the guilt phase, if he is found insane during the sanity phase, he will not be convicted of the crime.<sup>136</sup> This is not the case, however, if the defendant pleads only not guilty by reason of insanity without also pleading not guilty. A single plea of not guilty by reason of insanity is an admission of guilt for the act with which the defendant is charged; such a plea could also be characterized as “guilty but insane.”<sup>137</sup> Accordingly, if the defendant is found sane at the sanity phase of the trial, he must be convicted of the crime with which he is charged.<sup>138</sup>

#### 4. Burdens of proof and presumptions of sanity and insanity

California places both the burden of production and the burden of proof of legal insanity on the defendant.<sup>139</sup> In other words, in order to present a successful insanity defense, the defendant will have to come forward with enough evidence of his insanity to convince a judge or a jury that he was insane at the time he committed the crime.<sup>140</sup> Because the issue of sanity is raised as an affirmative defense, as opposed to an element of the crime with which the defendant is charged, the allocation of the burden on the defendant is not unconstitutional.<sup>141</sup>

Regardless of whether the defendant has pleaded guilty but insane, or not guilty and not guilty by reason of insanity, he will be

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135. For a discussion on the effect of the judgment of insanity, see *infra* Section C.

136. This does not mean, however, that the defendant is free to go. See *id.*

137. See CAL. PENAL CODE § 1026; *People v. Weaver*, 26 Cal. 4th 876, 964, 29 P.3d 103, 155, 111 Cal. Rptr. 2d 2, 64 (2001).

138. See CAL. PENAL CODE § 1026(a) (“[I]f the defendant pleads only not guilty by reason of insanity . . . [and] [i]f the verdict or finding is that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law.”).

139. See CAL. EVID. CODE §§ 550, 522 (West 1995).

140. California evidence code section 115 defines burden of proof as “the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.” CAL. EVID. CODE § 115 (West 1995 & Supp. 2002).

141. See *People v. Medina*, 51 Cal. 3d 870, 883, 799 P.2d 1282, 1290, 274 Cal. Rptr. 849, 857 (1990).

presumed sane at both the guilt phase and the sanity phase.<sup>142</sup> To escape conviction, he must prove he is insane, and he must do so by a preponderance of the evidence.<sup>143</sup>

The usual presumption of sanity at the sanity phase of the trial does not apply where there is proof that the defendant was insane before the commission of the crimes with which he is charged.<sup>144</sup> In that instance, the presumption is that the insanity “continued to exist until the time of the commission of the crime.”<sup>145</sup> Moreover, the presumption of insanity persists at the time of trial. Thus, the defendant should be presumed insane for the purposes of the competency or present sanity hearing.<sup>146</sup>

Evidence that would be deemed substantial for purposes of creating a continued presumption of insanity includes prior commitment to a state mental hospital or prior adjudication of the issue of insanity.<sup>147</sup> Thus, if, prior to the commission of a crime, a defendant has been previously committed to a mental facility or has been previously adjudged insane, he will be presumed insane both at the time of the commission of the crime and at the time of the trial.

A presumption of continuing insanity does not, however, relieve the defendant of his burden of proof.<sup>148</sup> He must still prove he is or was insane by a preponderance of the evidence. Nevertheless, he

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142. See *id.* “[T]he defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed.” *Id.*

143. See CAL. EVID. CODE § 522. In other words, the defendant bears the burden of proof on the issue of insanity. See generally *People v. Redmond*, 16 Cal. App. 3d 931, 93 Cal. Rptr. 543 (1971) (holding that in a criminal trial on the issue of sanity, the defendant must prove insanity by a preponderance of the evidence).

144. See *In re Dennis*, 51 Cal. 2d 666, 673–74, 335 P.2d 657, 661 (1959); *People v. Baker*, 42 Cal. 2d 550, 565, 268 P.2d 705, 714 (1954).

145. *In re Dennis*, 51 Cal. 2d at 674, 335 P.2d at 661.

146. See *In re Franklin*, 7 Cal. 3d at 141, 496 P.2d at 474, 101 Cal. Rptr. at 562.

147. See *id.* at 141 n.9, 496 P.2d at 474 n.9, 101 Cal. Rptr. at 562 n.9 (“[W]hen insanity has been adjudicated it is presumed to continue unless the contrary is shown.” (internal quotations omitted)); see also *In re Dennis*, 51 Cal. 2d at 669, 335 P.2d at 658 (finding evidence of prior insanity in hospitalization for schizophrenia).

148. See, e.g., *People v. Baker*, 42 Cal. 2d 565, 268 P.2d 714 (1954); 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW ELEMENTS § 16 (3d ed. 2000); W.E. Shipley, Annotation, *Presumption of Continuing Insanity as Applied to Accused in Criminal Case*, 27 A.L.R. 2d 121 (1953).

will be entitled to an instruction informing the jury of his insanity so that the jury may consider it when reaching its conclusion.<sup>149</sup>

### C. *The Effect of the Insanity Verdict*

One of the most misunderstood areas of the insanity defense is the effect of an insanity judgment. Because the effect of a guilty verdict is commonly understood to mean that the defendant will be punished accordingly, it does not require a great leap in logic to conclude that if a defendant is found guilty at the guilt phase and sane at the sanity phase, he should be convicted of the crime and sentenced.<sup>150</sup> Less clear, however, is what happens to a defendant who is found not guilty by reason of insanity.<sup>151</sup> What is a jury to make of a defendant whom they have found guilty, but who is not to be held responsible for his crimes? Section 1026 of California's penal code, which governs post judgment procedure, requires the defendant to be committed to an institution if he is found legally insane at the time of commission of a crime.<sup>152</sup> However, the jury may not know this. Television shows and films add to the confusion by depicting gleeful and devious defendants who use the insanity defense to "get off" or "beat the rap." It is a misconception that is popular with the entertainment industry: defendant commits a crime but successfully raises an insanity defense. But, defendant is no longer insane at the time of the trial . . . so defendant goes free! A jury that subscribes to this misconception might deliberately ignore evidence of a defendant's legal insanity in order to avoid releasing a violent criminal to walk the streets as freely as each juror.<sup>153</sup>

Jury misconception regarding the effect of an insanity judgment and its possible consequences were among the issues raised on

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149. *See id.*

150. *See* CAL. PENAL CODE § 1026(a) (West 1985 & Supp. 2003).

151. *See* *People v. Moore*, 166 Cal. App. 3d 540, 552, 211 Cal. Rptr. 856, 863 (1985).

152. *See* CAL. PENAL CODE § 1026(a). The fate of a defendant who is found insane at the time of the crime but is no longer insane at the time of trial is another matter entirely. *See infra* note 176.

153. *See generally Frontline: A Crime of Insanity*, (PBS television broadcast, (Oct. 17, 2002), available at <http://www.pbs.org/wgbh/pages/frontline/shows/crime> (discussing this problem generally and as it relates to New York state law)).

appeal by the defendant in *People v Moore*.<sup>154</sup> At trial, the defendant requested that the jury receive an instruction regarding the possibility that he would be institutionalized if they found him insane.<sup>155</sup> The trial court refused the defendant's request in part because the instruction offered by the defendant did not accurately reflect the law, and in part because the court reasoned that to instruct the jury on post judgment procedures would inappropriately "[focus] the juror's attention on [a] matter . . . [which] is certainly not [within] the function of the jury."<sup>156</sup>

On appeal, the defendant argued that the trial court's refusal unfairly prejudiced him.<sup>157</sup> Addressing the issue for the first time, the court of appeal agreed with the trial court. The court concluded: (1) that the role of the jury is to decide the facts that are put before it; (2) that the role of the court is to rule on issues of law; and (3) that the issue of punishment is a matter of law.<sup>158</sup> However, it also found that an exception to the general rule that juries should not be informed of the effects of judgments existed in the context of the sanity phase of a criminal trial.<sup>159</sup>

In justifying its conclusion, the court addressed three principal arguments against allowing an instruction of the type requested by the defendant: (1) as a general rule the jury is not concerned with a defendant's posttrial punishment, and to give such an instruction invites the jurors to speculate on matters beyond their province and perhaps return a compromise[d] verdict; (2) doubt that people in general are as ill-informed on postinsanity verdict disposition as [some courts have] assume[d]; and (3) the procedural aspects of requesting the instruction tend to give justice an "a la carte quality."<sup>160</sup>

In response to the first argument, the court reasoned that instructions on post verdict commitment proceedings are distinguishable from instructions on post verdict punishment. The latter address only the duration of a defendant's incarceration, while

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154. 166 Cal. App. 3d 540, 211 Cal. Rptr. 856 (1985).

155. *See id.* at 543, 211 Cal. Rptr. at 857.

156. *Id.* at 549, 211 Cal. Rptr. at 861.

157. *See id.*

158. *See id.*

159. *See id.* at 555–56, 211 Cal. Rptr. at 865–66.

160. *Id.* at 553, 211 Cal. Rptr. at 864 (citations omitted).



the former "pertain to the very nature of the defendant's disposition—whether or not he will be detained and the circumstances of the detention."<sup>161</sup> Thus, concerns underlying the prohibition on jury instructions relating to post verdict punishment should not apply with equal force to jury instructions relating to post sanity verdict proceedings.<sup>162</sup> The court further acknowledged that jurors, in fact, do consider the consequences of their verdict, despite prohibitions to the contrary.<sup>163</sup> The court posited that in light of this reality, and because instructions on post sanity verdict proceedings are distinguishable from those relating to punishment, a juror should know the general effect of a sanity or insanity verdict. Such knowledge should prevent false assumptions from swaying the jury's deliberations in favor of a false determination of sanity.<sup>164</sup>

Turning to the second argument, the court noted that California's post sanity verdict proceedings, as governed by penal code sections 1026(b)–1026.2, are highly complex and technical. The court also noted that "it is possible that at least some jurors are unaware of the postverdict disposition of an insane defendant."<sup>165</sup> The court continued, "The very phrase '*not guilty* by reason of insanity' itself could mislead some jurors to assume the defendant will walk free just as would an accused found not guilty for other reasons."<sup>166</sup>

Finally, the court countered the third argument by deferring to the California Supreme Court, which had recently decided that an analogous instruction should be given upon request by the defendant or a juror.<sup>167</sup> In concluding that the instruction should be available when requested, the court balanced the possibility of imprisoning a

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161. *Id.*

162. *See id.* at 554, 211 Cal. Rptr. at 865.

163. *See id.* at 554, 211 Cal. Rptr. at 864.

164. *See id.* at 554, 211 Cal. Rptr. at 864–65.

165. *Id.* at 554, 211 Cal. Rptr. at 865.

166. *Id.* But see REZNEK, *supra* note 39, at 273 (stating that jury studies reveal that jurors who were not instructed as to the effect of an insanity verdict "assumed correctly that the defendant would be committed," and arguing that effect-instructions do not effect the outcome of insanity trials).

167. *See Moore*, 166 Cal. App. 3d at 555, 211 Cal. Rptr. at 865. The instruction at issue in the guiding case, *People v. Ramos*, 463 U.S. 992 (1982), informed the jury that they should disregard the fact that the Governor might commute a sentence of death or life without parole.

defendant who did not deserve to be punished,<sup>168</sup> against the risk that when informed of the consequences of their verdict, the jury would shirk their responsibility to base its verdict solely on the evidence presented at trial.<sup>169</sup> Weighing these risks, the court found that the danger of improper imprisonment far outweighed that of inviting the jury to step outside their normal role.<sup>170</sup>

The court went on to suggest language to be used in the contemplated instruction.<sup>171</sup> California Jury instruction 4.01 is the codification of the court's holding in *Moore* and the instruction closely mirrors the language suggested by the court.<sup>172</sup> When requested by the defendant or a juror, the instruction informs the jury "a verdict of 'not guilty by reason of insanity' does not mean the defendant will be released from custody."<sup>173</sup> It further explains both that upon the return of such a verdict, the defendant will remain in confinement while the court determines whether the defendant is still insane, and that if the court finds the defendant's sanity has not been restored, the defendant will be hospitalized until the court determines the defendant's sanity has been fully recovered.<sup>174</sup> The instruction also tells the jury that the purpose of giving them such an instruction is to inform them of the "general scheme of [California's] mental health laws" so that they will not harbor any misunderstanding as to what will become of a defendant who is found not guilty by reason of insanity.<sup>175</sup> Finally, the jury is admonished not to consider any of what it has learned regarding the mental health laws, and that it must only decide whether the defendant was sane at the time of the commission of the acts with which he is charged, not whether he is sane at the time of the trial.<sup>176</sup>

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168. *See id.* at 555–56, 211 Cal. Rptr. at 866.

169. *See id.*

170. *See id.* at 556, 211 Cal. Rptr. at 866.

171. *See id.*

172. *See id.* at 556–57, 211 Cal. Rptr. at 866, CALJIC, *supra* note 21, no. 4.01.

173. CALJIC, *supra* note 21, no. 4.01.

174. *See id.* Interestingly, the instruction does not mention what happens if the defendant is found sane at the time of the verdict.

175. *Id.*

176. *See id.* For a more complete outline of confinement, reassessment of sanity, and terms of commitment, see CAL. WELF. & INST. CODE §§ 5000–5020.1 (West 1998 & Supp. 2003). For a detailed outline of restoration of

*D. Evidence: Expert Testimony vs. Folk Psychology*

As explained above, in order to successfully raise the insanity defense, a defendant must prove his insanity by a preponderance of the evidence.<sup>177</sup> This begs the question: What type of evidence would tend to convince a jury that the defendant was insane at the time of the crime?

Evidence of a defendant's insanity can be divided into two broad categories: (1) evidence that is presented to the jury in the form of expert testimony, which includes both medical diagnosis and opinion as to whether the defendant was sane at the time of the crime; and (2) evidence that the jury gleans from the facts and events surrounding the crime.<sup>178</sup> The latter form of evidence can be called "folk psychology," in that it enables a layperson to make a diagnosis of the defendant's mental condition at the time of the crime.<sup>179</sup> For example, evidence that a defendant hid a body where it could not easily be found suggests that he did not wish to be blamed for the murder, which in turn suggests that he knew the killing was wrong. As knowledge of wrongfulness precludes legal insanity, the body-hiding behavior would allow a jury to determine that the defendant was not insane when he killed.

Although psychiatric evaluations that lead an expert to conclude that the defendant was insane at the time of his illegal act may be valuable, it would be a mistake to say that evidence of this kind always sways a jury. Indeed, a jury could feasibly find a defendant sane despite unanimous expert testimony to the contrary.<sup>180</sup> In such a case, the jury has likely based its finding on common sense notions of insane behavior—or, stated another way, folk psychology.

As surprising as the above scenario may be, it is permitted by the nature of the role of expert testimony in an insanity proceeding.

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sanity proceedings, see *People v. Sword*, 34 Cal. App. 4th 614, 29 Cal. Rptr. 2d 810 (1995).

177. See *supra* Part X.B.4.

178. See generally *People v. Coddington*, 23 Cal. 4th 529, 2 P.3d 1081, 97 Cal. Rptr. 528 (2000); *People v. Skinner*, 185 Cal. App. 3d 1050, 228 Cal. Rptr. 652 (1985) (both discussing expert testimony as well as other types of evidence on which a jury might reasonably base a finding of sanity).

179. See REZNEK, *supra* note 39, at 287.

180. See, e.g., *People v. Lawley*, 27 Cal. 4th 102, 132, 38 P.3d 461, 483, 115 Cal. Rptr. 2d 614, 640; *People v. Skinner*, 185 Cal. App. 3d at 1059, 228 Cal. Rptr. at 658.

California courts have explained that expert testimony should be persuasive only if the jury believes that the underlying basis for the expert's conclusions is reliable and convincing.<sup>181</sup> In other words, it is not so much the opinion itself that is important, but the material on which the opinion is based and the analysis that leads to the conclusion.<sup>182</sup> Thus, if the jury does not accept the basis for an opinion as convincing or reliable, it need not give much weight to the expert's opinion. For example, a jury might conclude that the expert's examination of the defendant was insufficient,<sup>183</sup> or that the psychiatrist overlooked alternative explanations for the defendant's behavior,<sup>184</sup> or even that the psychiatrist was fooled by a malingering defendant.<sup>185</sup>

Although enlightening and potentially persuasive, expert testimony is arguably not even necessary to a determination of sanity because common sense may be all that a jury needs to render a verdict in an insanity proceeding. California courts have acknowledged that where the defendant's behavior betrays knowledge of wrongfulness, a jury can reasonably find a defendant sane despite expert opinion to the contrary. For example, in *People v. Skinner*, the court of appeal upheld the trial court's determination that the defendant was sane at the time he killed his wife in part because it found that the defendant's behavior after the killing supported the jury's conclusion that he was sane.<sup>186</sup> In particular, the court noted that after the killing, the defendant changed his bloodstained clothes and made statements to the police

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181. See *Lawley*, 27 Cal. 4th at 132, 38 P.3d at 483, 115 Cal. Rptr. 2d at 640; *Skinner*, 185 Cal. App. 3d at 1059, 228 Cal. Rptr. at 658.

182. See *id.*

183. See *Skinner*, 185 Cal. App. 3d at 1060, 228 Cal. Rptr. at 658 (explaining the jury's apparent determination that expert conclusions were "somewhat speculative" because one psychiatrist did not interview the defendant until six months after the crime).

184. See *People v. Coogler*, 71 Cal. 2d 153, 167, 454 P.2d 686, 694, 77 Cal. Rptr. 790, 798 (1969) (noting that the defendant may not have shot the victims because he was insane, but because he wished to avoid identification). However, *Coogler* is not an insanity case—it deals with the analogous determination of the defendant's diminished capacity.

185. See *People v. Coddington*, 23 Cal. 4th 529, 583, 2 P.3d 1081, 1127, 97 Cal. Rptr. 528, 579 (1985) (suggesting that the jury could find that the defendant lied during his psychological evaluation, and that the expert's assumption was based, at least in part, upon that lie).

186. See *Skinner*, 185 Cal. App. 3d at 1061, 228 Cal. Rptr. at 659.

demonstrating not only his remorse for the act, but also his understanding that what he had done was wrong.<sup>187</sup>

Similarly, in *People v. Coddington*, the Supreme Court of California affirmed the trial court's holding that the defendant was legally sane when he killed two women and raped two adolescent girls.<sup>188</sup> Again, the affirmation was based in part on the court's conclusion that the jury was justified in relying upon evidence of the defendant's behavior immediately prior to the crime, rather than on expert testimony that he was insane.<sup>189</sup> Like Skinner, Coddington betrayed his knowledge of the wrongfulness of his act in his choice of wardrobe—he donned a series of disguises to conceal his identity, both immediately prior to and during the crime.<sup>190</sup> Furthermore, Coddington planned extensively before initiating contact with his victims, presumably to avoid detection and apprehension.<sup>191</sup>

Clearly, both folk psychology and expert testimony play an important role in comprising the evidence a defendant must produce to succeed on an insanity defense. It would be wise, therefore, for a defendant not to rely too heavily on psychiatric testimony if, when he committed the crime, he behaved in a manner that would allow a jury to make a common sense determination that he was sane.

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187. *See id.*; *see also supra* Part X.A.3 (discussing the wrongfulness prong of the test for insanity).

188. *Coddington*, 23 Cal. 4th at 547, 2 P.3d at 1103, 97 Cal. Rptr. at 553.

189. *See id.* at 584–85, 2 P.3d at 1128, 97 Cal. Rptr. at 580.

190. *See id.* at 551, 2 P.3d at 1106, 97 Cal. Rptr. at 556.

191. *See id.* at 547, 2 P.3d at 1104, 97 Cal. Rptr. at 553.